

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 451.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. F. MOORE, C. E. ROBINSON, AND S. H. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED FEBRUARY 6, 1913.

(23,540)

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a In the Supreme Court of the State of Oklahoma.

Return to Writ.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma, this 27th day of January, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1 THE UNITED STATES OF AMERICA, *ss.*:

The President of the United States to H. F. Moore, C. E. Robinson and S. H. Smith, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff in error, and you, H. F. Moore, C. E. Robinson and S. H. Smith are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this 9th day of January, A. D. 1913.

JOHN B. TURNER,
Chief Justice of the Supreme Court
of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

OKLAHOMA CITY, OKLA., January 9th, 1913.

I, the undersigned attorney of record for defendants in error in the above entitled cause, hereby acknowledge the service of the

above citation, and enter an appearance in the Supreme Court of the United States.

H. H. SMITH,

RITTEN, & RITTEN,

Attorneys for Defendants in Error.

2 [Endorsed:] No. 2016. In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma. In the Supreme Court of the State of Oklahoma. The Atchison, Topeka & Santa Fe Railway Company, Plaintiff in Error, vs. H. F. Moore et al., Defendants in Error. Citation. Filed Jan. 9, 1913. W. H. L. Campbell, Clerk.

3 In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Oklahoma:

The petitioner, The Atchison, Topeka and Santa Fe Railway Company respectively shows that on the 22nd, day of October, A. D. 1912 the Supreme Court of the State of Oklahoma entered a judgment herein in favor of the defendant in error and against the plaintiff in error in which said judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this petitioner, all of which more in detail appear in the assignment of errors filed with this petition.

That after the rendition of said judgment and on the 5th, day of November, A. D. 1912 your petitioner filed a petition for rehearing, a copy of which said petition is hereto attached, marked Exhibit "A," and made a part hereof; that thereafter and on the 24th, day of December, A. D. 1912 an order was made by this court denying said petition, and thereupon an opinion was filed in this cause by this court affirming the judgment of the District

4 court of Lincoln County, State of Oklahoma, a copy of which opinion is hereto attached, marked Exhibit "B" and made a part hereof, and the defendant below, your petitioner, respectfully shows that there was a judgment in said cause in the District Court of Lincoln County State of Oklahoma in favor of the defendant in

error and against your petitioner for the sum of Fourteen Hundred Dollars, and costs of suit, which said judgment upon appeal to the Supreme Court of the State of Oklahoma was affirmed by said court.

And your petitioner further respectfully shows that the said Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision in said cause could be had, and your petitioner claims the right to remove said cause to the United States Supreme Court by writ of error under the statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court of the State — Oklahoma and the proceedings in said cause certain errors were committed to the prejudice of petitioner, The Atchison, Topeka and Santa Fe Railway Company, all of which will more in detail appear from the assignments of error which is filed with this petition.

And because by said judgment the said Supreme Court of the State of Oklahoma there was denied to your petitioner a title, right, privilege or immunity claimed by your petitioner in the proceedings in said case under the constitution of the United States and under a statute of the United States, and an authority exercised under the United States.

And because your petitioner claimed in said cause that the alleged contract set forth in the petition and amendments thereto in said contract was void as being in violation of the Statutes of the United States, that is to say in violation of the Act of Congress approved

February 4, 1887 and in effect April 5, 1887 (24 Statutes at 5 Large 379) as amended by an Act approved March 2, 1889

(25 Statutes at Large 885) and by an Act approved February 10th, 1891 (26 Statutes at Large 743) and by an Act approved February 8, 1895 (28 Statutes at Large 643) and by an Act approved June 29, 1906 (34 Statutes at Large 584) known as the Interstate Commerce Act or an Act to regulate commerce, which said claim of a right, title or immunity under said Act of Congress and the amendments thereto was denied your petitioner by said judgment of said Supreme Court of the State of Oklahoma.

Because your petitioner claimed in said cause that the alleged contract in the petition and the amendments thereto in said case was in direct conflict with the Act to regulate commerce and the amendments thereto, and that the judgment of the District Court of Lincoln County, which said judgment was affirmed by the Supreme Court of the State of Oklahoma could not be affirmed without giving validity to an alleged contract made in direct violation of the terms of said Act to Regulate Commerce; that the conclusion of the Supreme Court of the State of Oklahoma that it could legally dispose of the issues in said case without passing upon and deciding as to whether or not said alleged contract of shipment was in violation of the Act to Regulate Commerce is erroneous and of no legal effect, and, as a matter of fact, is a denial of the contention of this petitioner that said pretended contract was in violation of the Act to Regulate Commerce, which said claim of a right, title or immunity under said Acts of Congress and the amendments thereto was denied

to your petitioner by said judgment of said Supreme Court of the State of Oklahoma.

Wherefore, your petitioner claims and says that by a final judgment in a suit in the highest court of the State of Oklahoma in which in said cause could be had there was a right, title, 6 privilege or immunity which was specially set up or claimed under the constitution of and under the statutes of the United States by your petitioner, and the decisions of said court was against such right, title privilege or immunity which was so specially set up and claimed by your petitioner under such constitution and such statute and wherefore and in accordance with the statute in such case made and provided therefor your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors, and assignment whereof is filed with this petition, and that a transcript of the record, proceedings and files and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

And your petitioner prays for the allowance of a citation and supersedeas in due form of law, and your petitioner will ever pray.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Petitioner.*

By COTTINGHAM & BLEDSOE,
CHARLES H. WOODS,
GEO. M. GREEN,

Its Attorneys.

EXHIBIT "A."

In the Supreme Court of the State of Oklahoma.

No. 2015.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

C. E. ROBINSON, *Defendant in Error.*

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. F. MOORE et al., *Defendants in Error.*

Petition for Rehearing.

The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error in the above entitled causes, respectfully moves this court to grant it a rehearing upon the opinion and judgment of this Court

rendered herein on the 22nd day of October, A. D. 1912, by which the judgment of the lower court was affirmed.

In support of the motion the plaintiff in error respectfully submits:

I.

That the opinion and judgment of this court is in direct conflict with the Act to Regulate Commerce (35 U. S. 3591) and the amendments thereto; that said judgment could not be affirmed without giving validity to an alleged contract made in direct violation of the terms of said Act to Regulate Commerce; that the conclusion of this Court that it could legally dispose of the issues in this cause without passing upon and deciding as to whether or not said alleged contract of shipment was in violation of the Act to Regulate Commerce is erroneous and of no legal effect and, as a matter of fact, is a denial of the contention of this plaintiff in error that said pretended contract was in violation of the Act to Regulate Commerce.

II.

That the decision of this Court is in direct conflict with the Act to Regulate Commerce as construed by the Supreme Court of the United States in the case of Chicago & Alton R. Co., v. Kirby, decided May 27th, 1912, and reported in Advance Sheets to Lawyer's Cooperative Edition Vol. 32, page 648; that the effect of the opinion and judgment of this Court is to give validity to a contract similar to that held void by the Supreme Court of the United

States, and to impose a greater burden because of said pretended oral contract upon the plaintiff in error than could be lawfully imposed under the terms of said Act to Regulate Commerce and under the published tariffs of the plaintiff in error.

III.

That the Court either overlooked or disregarded the fact that notwithstanding the defendant in error, the plaintiff below, sued upon an alleged oral contract, that he admitted *the* prior to the movement of the live stock involved he voluntarily went to the office of the railway company and executed a written contract, and further that he went there for the express purpose of obtaining such contract and did obtain and execute the same and secured the benefit of the rate applicable thereto. The Court in ignoring or disregarding said facts either overruled or disregarded the opinion of the Supreme Court of the State in St. L. & S. F. R. R. Co. v. Ladd, 124 Pacific 461. This plaintiff in error respectfully insists that a decision of said cause made in disregard of the fact that the plaintiff sought and obtained the written contract set out in defendant's answer and offered and admitted as a part of his evidence on cross-examination is of necessity erroneous and prejudicial to it; that it denies any legal effect of the written contract freely entered into by the parties, under which the horses moved, under which the rate was fixed, and under which the charges were

paid; and that the disregarding or ignoring of said contract resulted in the doing of a gross injustice to the plaintiff in error.

IV.

The decision of this court overlooks and does not decide or pass upon important propositions urged in the brief of plaintiff in error, which establish the incorrectness of the judgment of the lower court; that the court inadvertently misconstrued the facts, and does not correctly state the facts, as shown by the record.

V.

That the opinion of the court is not only opposed to the weight of authority, but is not supported either by precedent or authority, is violative of the law as declared by the Supreme Court of this State and of the Supreme Court of the United States, and prejudicial to the plaintiff in error, and a rehearing should be granted and the cause reversed and ordered dismissed.

COTTINGHAM & BLEDSOE,
CHARLES H. WOODS,
GEO. M. GREEN,

Attorneys for Plaintiff in Error.

9

EXHIBIT "B."

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Two.

No. 2016.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in
Error.

Syllabus.

1. Plaintiff sued for damages done to a shipment of race horses, alleging shipment to have been made under a definite verbal contract, charging gross negligence and praying for full amount of damages. Defendant answered by general denial and by pleading a written contract which limited its liability to the value therein named, and by the further allegation that the written contract was the only one made between the parties. Plaintiff's reply was in effect an unverified general denial of new matter. Held: The overruling of Plaintiff's motion for judgment on the pleadings because of the unverified reply was not error.

The issues whether the shipment was made under a verbal agreement and whether defendant was guilty of gross negligence were joined by defendant's general denial, and plaintiff had the

right *ha* have such issues determined and was entitled to any evidence relevant, competent and material to a determination of the same, regardless of the written contract, and regardless of the fact that a determination of such issues had the effect of rendering the provisions of the written contract not binding.

2. Where a shipment of live stock consists of race horses shipped for the purpose of being entered in certain races and the carrier has notice of the class to which the stock belongs and the purpose for which it is shipped and the agent of the carrier at the destination of the shipment is notified that some of the stock has been injured and such agent goes to the stables where such injured stock is kept and sees same and has ample opportunities to ascertain the extent of the injuries: Held: This is a substantial compliance with the provisions of the shipping contract requiring notice of the injury to be given before the stock is removed or slaughtered or mingled with other stock.

3. Where a shipment of live stock is made under a verbal contract and where every move made, every step taken toward a shipment, up to and including a complete consignment and surrender of control by the shipper, the starting in transit of the shipment and the assumption of liability for negligence by the carrier, is all under and pursuant to such parole agreement, and after this a printed shipping contract is presented to the shipper to sign, he has a right to assume that it embodies the terms of the verbal agreement, and the carrier will not be permitted to escape liabilities accruing to the shipper under the verbal agreement by reason of certain provisions in the written contract at variance with the parole contract, unless the shipper's attention has been called to such provisions and fair opportunity given him to *assent* to same.

19 Error from the District Court of Lincoln County—Hon. John J. Carney, Judge.

Action by H. F. Moore, C. E. Robinson, and S. H. Smith Against the Atchison, Topeka & Santa Fe Railway Company for Damages.

Judgment for plaintiffs, and defendant brings error.
Affirmed.

Cottingham & Bledsoe, Charles H. Woods and George M. Green, for plaintiff in error.

H. H. Smith, and Rittenhouse & Rittenhouse, for defendants in error.

HARRISON, C:

This action was begun in the District Court of Lincoln County, June 20, 1908, by H. F. Moore, C. E. Robinson and S. H. Smith, against the Atchison, Topeka & Santa Fe Railway Company for damages in the sum of \$1,990, resulting from injuries alleged to have been done to one *Sousa Mc*, a trotting mare, shipped with some

other race horses over said railroad from Kansas City, Missouri to Lawrence, Kansas, in September, 1907. The case was tried in April, 1910, resulting in a verdict and judgment in favor of plaintiff in the sum of \$1,400. From which judgment the defendant, the railway company, appeals.

The shipment in which the animal, Sousa Mc, is alleged to have been injured was the same shipment in which the racing mare, Nancy Alden, was injured and recovery had for such injuries in a judgment which was affirmed by this court in case No. 2015, entitled the A. T. & S. F. Ry. Co. v. C. E. Robinson. The two cases are identical, both in points of law, and questions of fact and in every material feature, except as to the value of the animal, the extent of the injuries and the amount of damages resulting therefrom. The question of the value of the animal, the extent of the injuries done to her and the amount of damage resulting therefrom, were fairly submitted to the jury and a verdict returned in favor of the plaintiff for the sum of \$1,400. The verdict being fairly supported by the evidence and the questions of law involved in this case being identical with those involved in case No. 2015, and finding no material errors committed in the trial of this cause, following the decision in the case No. 2015, the judgment of the Court below is affirmed.

11 [Endorsed:] No. 2016. In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma. In the Supreme Court of the State of Oklahoma. The A. T. & S. F. Ry. Co., Plaintiff in Error, vs. H. F. Moore et al., Defendants in Error. Petition for Writ of Error. Filed Jan. 9, 1913. W. H. L. Campbell, Clerk.

12 In the Supreme Court of the State of Oklahoma.

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in Error.

Assignment of Errors.

The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error in the above entitled cause, respectfully shows that on the trial of said cause and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State in said cause manifest errors were committed to its prejudice, which are apparent from the record therein: That the errors committed by the trial court and affirmed by the Supreme Court of the State and committed by the Supreme Court of the State in its opinion and judgment in said cause are more particularly set forth as follows:

First: That the Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Lincoln County, State of Oklahoma.

Second: That the Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Lincoln County, State of Oklahoma.

Third: The Supreme Court of Oklahoma erred in holding that the contract set forth in the petition and amendments thereto of the defendant in error, plaintiff below, was a valid contract.

13 Fourth: The Supreme Court of Oklahoma erred in refusing to hold said contract void as being a contract in violation of the Act of Congress of February 4, 1887 and the amendments thereto, commonly called the Interstate Commerce Act or the Act to Regulate Commerce.

Fifth: The Supreme Court of Oklahoma erred in affirming said judgment enforcing a contract which was void as being in contravention of and a violation of the Act of Congress of February 4th, 1887, and the amendments thereto, entitled an Act of Congress of February 4, 1887 approved February 4, 1887, and in effect April 5, 1887 (24 Statutes at Large 379) as amended by an Act approved March 2, 1889 (25 Statutes at Large 885) and by an Act approved February 10th, 1891 (26 Statutes at Large 743) and by an Act approved February 8, 1895 (28 Statutes at Large 643) and by an Act approved June 29, 1906 (34 Statutes at Large 584) known as the Interstate Commerce Act or an Act to Regulate Commerce.

Sixth: The Supreme Court of Oklahoma erred in its failure to consider the federal question presented in said cause and in concluding that said Supreme Court of the State of Oklahoma could legally dispose of the issues in said cause without passing upon and deciding as to whether or not said alleged contract of shipment was in violation of the Act to Regulate Commerce, and such action was a denial to the plaintiff in error of a right, title, privilege and immunity specially set up and claimed under such clause and section of the said Interstate Commerce Act, to the great damage of the plaintiff in error.

Seventh: The Supreme Court of Oklahoma erred in holding that the alleged contract was not invalid and that it was, if made, in violation of the Act of Congress and amendments and particularly in violation of Sections 2, 3, 6, and 10 of said Act of Congress as amended June 29th, 1906.

14 Eighth: The Supreme Court of Oklahoma erred in refusing to hold that said contract was invalid as being in violation of said Act and sections thereof.

Ninth: The Supreme Court of Oklahoma erred in refusing to hold that said contract was discriminatory and unlawful under said Act and sections thereof.

Tenth: The Supreme Court of Oklahoma erred in holding that the defendant in error was not bound by the terms and provisions of the tariffs and classifications on file with the Interstate Commerce Commission and with its Agent at Kansas City, Missouri, the point of origin of said shipment.

Eleventh: The Supreme Court of Oklahoma erred in holding that

the plaintiff in error had a right under the evidence in the case to agree to carry the horses in said shipment upon its Red Ball freight train.

Twelve: The Supreme Court of Oklahoma erred in holding that the alleged agreement to carry the horses upon the Red Ball freight train, a particular train, was not an agreement to perform a special service not provided for by the published tariff and classification.

Thirteenth: The Supreme Court of Oklahoma erred in holding that the contract of shipment was the oral negotiations had over the telephone with the shipper and someone representing himself to be the agent of the railway company, which said contract was in direct violation of and not one provided for by the tariffs and classifications which were on file with the Interstate Commerce Commission and with petitioner's agent at point of origin, and in holding that said verbal negotiations were the contract of shipment, and were not superseded by the written contract of shipment entered into by the parties subsequent to said alleged oral contract.

Fourteenth: The Supreme Court of Oklahoma erred in holding that the defendant in error was not presumed to have knowledge of the provisions of said Act and sections thereof, and the provisions of the tariffs and classifications on file with the Interstate Commerce Commission and with the Agent at Kansas City, Missouri, the point of origin of said shipment.

Fifteenth: The Supreme Court of Oklahoma erred in holding that the defendant in error was not presumed to know that he contracted for a lower rate than that to which he was lawfully entitled and that he contracted for special privilege in shipment by designated train to which he was not lawfully entitled, and for which the plaintiff in error and defendant in error could not contract without violating said Acts of Congress and sections thereof.

Sixteenth: The Supreme Court of Oklahoma erred in its construction and application of the law with reference to said Act and Sections thereof as hitherto declared and announced by the Supreme Court of the United States.

Seventeenth: The Supreme Court of Oklahoma erred in that the judgment aforesaid given was given for said defendant in error and against The Atchison, Topeka and Santa Fe Railway Company, whereas, by the law of the land, the said judgment ought to have been given for the said The Atchison, Topeka and Santa Fe Railway Company.

For which errors The Atchison, Topeka and Santa Fe Railway Company prays that the said judgment of the Supreme Court of State of Oklahoma and of the District Court of Lincoln County, State of Oklahoma be reversed, and a judgment rendered in favor of the plaintiff in error and for its costs.

COTTINGHAM & BLEDSOE,
CHARLES H. WOODS,

GEO. M. GREEN,

Attorneys for Plaintiff in Error.

16 [Endorsed:] No. 2016. In the Supreme Court of the State of Oklahoma. The A. T. & S. F. Ry. Co., Plaintiff in Error, vs. H. F. Moore, et al., Defendant in Error. Assignment of Errors. Filed Jan. 9, 1913. W. H. L. Campbell, Clerk.

17 In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendant in Error.

Order Allowing Writ of Error.

Let the writ of error issue upon the execution of a bond by The Atchison, Topeka and Santa Fe Railway Company to H. F. Moore, C. E. Robinson and S. H. Smith, in the sum of Four Thousand (4,000) Dollars, such bond when approved to act as a supersedeas.

Dated at Oklahoma City in the State of Oklahoma this 9th day of January A. D. 1913.

JOHN B. TURNER,
*Chief Justice of the Supreme Court of
the State of Oklahoma.*

Attest:

W. H. L. CAMPBELL,
[SEAL] *Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

Endorsed: No. 2016. In the Supreme Court of the United States and in The Supreme Court of the State of Oklahoma. In the Supreme Court of the State of Oklahoma. The A. T. & S. F. Ry. Co. Plaintiff in Error, vs. H. F. Moore et al., Defendants in Error. Order allowing Writ of Error. Filed Jan. 9, 1913. W. H. L. Campbell, Clerk.

18 In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma,

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in Error.

Writ of Error.

19 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, or some of you, the highest court of law or equity of said State in which a decision could be had in said suit between The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and H. F. Moore, C. E. Robinson, and S. H. Smith, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute *or of* an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity or wherein was drawn in question the construction of a clause of the Constitution *or of* a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears.

20 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 9th day of January A. D. 1913.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,

*Clerk of the United States District Court
for the Western District of the State of Oklahoma.*

Approved and allowed by the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma.

JOHN B. TURNER,

Chief Justice of the Supreme Court of the State of Oklahoma.

21-23 [Endorsed:] No. 2016. In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma. In the Supreme Court of the State of Oklahoma. The A., T. & S. F. Ry. Co., Plaintiff in Error, vs. H. F. Moore et al., Defendants in Error. Writ of Error. Filed Jan. 10, 1913. W. H. L. Campbell, Clerk.

24

#2016.

In the Supreme Court of the State of Oklahoma.

No. —.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in Error.

Petition in Error and Case Made.

Filed Sep. 26, 1910. W. H. L. Campbell, Clerk.

25 Filed Sep. 26, 1910. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 2016.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in Error.

Petition in Error.

Comes now the plaintiff in error and for its cause of action in error alleges and says:

I. That heretofore, to-wit, on the 30th day of April, 1910, judgment was rendered against The Atchison, Topeka and Santa Fe

Railway Company, plaintiff in error, in the District Court of Lincoln County, State of Oklahoma, in the sum of \$1,400.00 and costs of said action;

II. That the pleadings in said cause with all the orders and judgment of the court, together with all evidence introduced on the trial, the rulings of the court thereon, and all proceedings had in said cause are embodied in a case-made by the plaintiff in error, duly made and served, and by the Honorable J. J. Carnery, the Presiding Judge at the trial of said cause, duly settled and signed and attested by the Clerk of the District Court of Lincoln County, State of Oklahoma, which said original case made is hereto attached, marked Exhibit "A", and here referred to and made a part of this petition in error, which said case made contains all the rulings of the court below, the proceedings on which said rulings were based, and all matters in connection therewith, to enable this Court to review 26 said judgment and proceedings on which same was based and to treat the assignments of error herein made by reference to said case made.

III. The plaintiff in error alleges that the Court below erred to the substantial prejudice of the plaintiff in error in numerous, divers and sundry rulings in said proceedings, all of which more fully appear in said case made hereto attached, marked Exhibit "A," that is to say:

First. That the court erred in overruling the motion for new trial filed by the plaintiff in error.

Second. That the court erred in rendering judgment upon the verdict of the jury in favor of the defendant- in error and against the plaintiff in error, said verdict appearing to have been rendered under the influence of passion or prejudice and being too large.

Third. That the Court erred in rendering judgment against the plaintiff in error.

Fourth. The Court erred in rendering judgment upon the verdict of the jury in favor of the defendant- in error and against the plaintiff in error, said verdict not being supported or sustained by sufficient evidence and for the reason that the same is contrary to law.

Fifth. Because the Court erred to the substantial prejudice of the plaintiff in error in misdirecting the jury as to matters of law, to which instructions of the court, the plaintiff in error at the time duly excepted and still excepts.

Sixth. That the Court erred to the substantial prejudice of the plaintiff in error in errors of law occurring at the trial of said cause and excepted to by the plaintiff in error, at the time.

Seventh. That the Court erred in admitting certain irrelevant, incompetent and immaterial testimony over the objection of the plaintiff in error at the trial of said cause, to which ruling of the 27 court, the plaintiff in error duly excepted at the time and still excepts.

Eighth. That the Court erred to the substantial prejudice of the plaintiff in error in refusing to admit certain competent, relevant and material testimony offered by the plaintiff in error at the trial of said cause, to which ruling of the court, the plaintiff in error duly excepted at the time and still excepts.

Ninth. That the court erred in its instructions to the jury, to the giving of which instructions, the plaintiff in error duly excepted at the time and still excepts.

Tenth. That the Court erred to the substantial prejudice of the plaintiff in error in refusing to give to the jury certain pertinent, relevant and material instructions requested by the plaintiff in error, being instructions numbered from one to five, inclusive, to which refusal of the Court, the plaintiff in error at the time duly excepted and still excepts.

Eleventh. That the court erred in approving the verdict of the jury and in rendering judgment against the plaintiff in error and in favor of defendant- in error, to which action of the Court, the plaintiff in error at the time duly excepted and still excepts.

Twelfth. That the Court erred in overruling the objection of the plaintiff in error to the introduction of any evidence by the defendant- in error at the beginning of the trial of said cause, to which action of the court, the plaintiff in error at the time duly excepted and still excepts.

Thirteenth. That the court erred in overruling the motion of the plaintiff in error for judgment upon the pleadings in this cause, to which ruling of the court, the plaintiff in error at the time duly excepted and still excepts.

28 Fourteenth. That the Court erred in overruling the demurrer of the plaintiff in error at the conclusion of the evidence of the defendant- in error, to which action of the court the plaintiff in error at the time duly excepted and still excepts.

Fifteenth. That the Court erred in overruling the motion of the plaintiff in error at the conclusion of all the evidence for the court to instruct the jury to return a verdict in favor of the plaintiff in error, to which action of the court, the plaintiff in error at the time duly excepted and still excepts.

Sixteenth. That the court erred to the prejudice of the plaintiff in error in construing the interstate commerce act as not only destroying the terms of a contract made for the transportation of freight at published rates, but in holding that the same destroyed all rights of compensation and that said tariff so filed in accordance with the commerce act was not binding upon the defendant- in error as to the contract of shipment entered into between the plaintiff in error and the defendant- in error, to which ruling of the court, the plaintiff in error duly excepted at the time and still excepts.

Seventeenth. That the Court erred in its construction of said interstate commerce act in holding that a reduced rate of freight in consideration of the shipment being valued at a specific amount discharged the shipper from liability to said specific amount and in holding that the shipper was not bound by the terms and conditions of said tariff so filed with the interstate commerce commission and on file at the depot of the plaintiff in error at Kansas City, Missouri, to which ruling of the court the plaintiff in error at the time duly excepted and still excepts.

29 Eighteenth. That the court erred in overruling the motion for new trial filed by the plaintiff in error, to which ruling of

the court the plaintiff in error at the time duly excepted and still excepts.

Wherefore, the plaintiff in error prays that this Court may review said judgment and examine the errors contained in said case made, and that upon hearing said judgment of the Court below may be reversed and this cause may be remanded to the Court below with instructions to enter judgment in favor of the plaintiff in error and for such other and further relief as may be proper, just and consistent with equity and good conscience and that the plaintiff in error may have its costs herein expended.

COTTINGHAM & BLEDSOE.

CHAS. H. WOODS,

GEO. M. GREEN,

Attorneys for Plaintiff in Error.

30-50

"EXHIBIT A."

Filed Sep. 15, 1910. D. J. Norton, Clerk District Court, Lincoln County, Okla.

Case Made.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Be it remembered that heretofore to-wit 29th day of June, 1908, the plaintiffs, H. F. Moore, C. E. Robinson, and S. H. Smith, commenced their action against the defendant, The Atchison, Topeka and Santa Fe Railway Company, by filing in the District Court of Lincoln County, Oklahoma their petition, which is in words and figures, to wit:

51 Whereupon the 10th day of November 1908, said cause was set for trial, which order of the Court is in words and figures as following, to-wit:

52 Court convened Nov. 10th, 1908, at 9 o'clock A. M. pursuant to adjournment.

Officers present, Hon. W. N. Maben, Presiding Judge; D. J. Norton, Clerk; John J. Davis, County Attorney, Chas. B. Wilson, Jr., Deputy County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter, R. Lee Waldrip, Court Crier.

Public proclamation having been ordered by the court, announced by the crier for the opening of the court, the following proceedings were had and business —, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiffs,
vs.
THE A., T. & S. F. R. R. Co., Defendant.

Ordered by the court that said cause be set for trial November 24, 1908.

53 Whereupon the 16th day of November 1908, leave was granted the defendants to file Demurrer to Plaintiffs' Amended Petition, which ruling of the Court is in words and figures, as following, to-wit:

54 Court convened Nov. 16, 1908, at 9 o'clock A. M. pursuant to adjournment.

Officers present, W. N. Maben, Presiding Judge; D. J. Norton, Clerk; John J. Davis, County Attorney; Chas. B. Wilson, Deputy County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter; R. Lee Waldrip, Court Crier.

Public proclamation having been ordered by the Court, announced by the Crier for opening of the Court, the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE, C. E. ROBINSON, and S. F. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Ordered by the court that leave be granted defendant to file Demurrer.

55 Whereupon the 16th day of November 1908 the defendants filed their demurrer to plaintiffs' amended petition, which Demurrer is in words and figures as following, to-wit:

56 In the District Court of Lincoln County, Oklahoma.

C. E. ROBINSON, Plaintiff,
vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Demurrer.

Comes now the defendant, The Atchison, Topeka & Santa Fe Railroad Company by its Attorneys, Hoffman & Robertson, and demurs to the petition of the plaintiff filed herein for the reason said petition

does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

HOFFMAN & ROBERTSON,
Attorneys for Defendant.

57 Whereupon the 23rd day of November 1908, leave is granted Plaintiffs to file Amended Petition, which Order of the Court is in words and figures as following, to-wit:

58 Court convened Nov. 25, 1908, at 9 o'clock A. M., pursuant to adjournment.

Officers present, James R. Tolbert, Presiding Judge; D. J. Norton, Clerk; L. E. Martin, Sheriff; John J. Davis, County Attorney, Chas. B. Wilson Jr., Deputy County Attorney; Earl Hickman, Court Reporter; R. Lee Waldrip, Court crier.

Public proclamation having been ordered by the court and announced by the crier, and in opening of the court the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiff,
vs.
A., T. & S. F. R. R. Co., Defendant.

On application is granted plaintiffs to file Second Amended Petition.

59 Whereupon the 25th day of November 1908, the Plaintiffs filed their Second Amended Petition, which is in words and figures as following, to-wit:

60 STATE OF OKLAHOMA,
Tenth Judicial District, ss:

In the District Court, in and for Lincoln County, State of Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendants.

Petition Amended.

Now comes the plaintiffs and for their cause of action herein complain and allege:

1.

That H. F. Moore, one of the plaintiffs in this action is a resident of the City of Midland, County of Stanley, and State of South Dakota; and C. E. Robinson is a resident of Winfield, in the State of Kansas; and S. H. Smith is a resident of the City of Washington

in the District of Columbia, and at the times hereinafter alleged they were the owners of the black trotting mare, Sousa Mc, and at the times hereinafter alleged were racing and training the said mare; and at the times hereinafter mentioned, the defendant, the Atchison, Topeka & Santa Fe Railway Company, was a corporation organized under the laws of the State of Kansas, and was the owner of, and operated a railroad as such corporation, from and through the City of Kansas City, in the County of Jackson, and the State of Missouri, to and through the City of Lawrence, in the County of Douglas, and State of Kansas, together with the tracks, cars, locomotives and other appurtenances thereto belonging; and at the times hereinafter alleged was a common carrier of freight and passengers for hire between the City of Kansas City in the County and State aforesaid, and the City of Lawrence in the County and State aforesaid.

61

2.

That on or about the 17th day of September 1907, the plaintiffs delivered to the defendant the said trotting mare, Sousa Mc, together with three other head of trotting and racing horses at their yards in the city of Kansas City, County and State Aforesaid, about four o'clock P. M. for the purpose of transporting or conveying the said Sousa Mc to the City of Lawrence in the County and State aforesaid, for the purpose of racing her there in races, and the defendant, its agents and servants and employees, whose names are and were unknown to these plaintiffs, and as these plaintiffs are informed, were the clerks in the freight department of the defendant at their general freight office in the City of Kansas City, and State of Missouri; that said clerk or clerks stated that they would deliver said mare out of the City of Kansas City within the County and State aforesaid, on a freight train at or about 10:00 o'clock of the same evening; and that said freight train was a fast freight and did not gather local freight; and in pursuance of said promise, the said clerk directed two of these plaintiffs, C. E. Robinson and H. F. Moore, to lead the said horse between the hours of 4:00 o'clock and 6:00 o'clock at the platform of their yards at the receiving freight office in said city, County and State in the evening previous to the night following the day when said injuries occurred, but the defendant, its agents and servants failed to convey said mare according to said promise and conversation, and left her with the remaining three horses, which were loaded and shipped with her, in a box car on the tracks of the defendant for a number of hours in said car as these plaintiffs believe, on defendant's track in said City of Kansas City, where said car was violently moved and knocked around and handled carelessly and with gross negligence on the part of the defendant, its agents and servants in making up a local train of

62 cars in which train was the car in which this mare was loaded and in moving around the said car over the tracks of the said defendant, during the night, the said mare was knocked down several times and bruised and injured as herein alleged; as he believes said injuries principally occurred in Kansas City, Missouri, on the tracks of the defendant, and as they believe, and are

informed, the said mare was left out of the fast freight train and finally shipped in a local freight train and deposited about daylight or during the latter part of the night, in what is known as the Argentine yards as plaintiffs are informed, said Argentine yards being a switching track where freight was made up and collected for transportation. That said mare was hauled and transported from the said City of Kansas City, County of Jackson and State aforesaid, on a way freight train which collected local freight, and contrary to the promise and conversation, made by the defendant and its said employee, with these plaintiffs; that the plaintiffs are not informed and were not at that time, of the names of the stations or the points where and when said mare was injured, nor are they informed of the names of any station agents or employees with whom they protested during the night for handling the car roughly as alleged hereinbefore; and they allege that said mare was injured some where between the time she was loaded in the yards about 6:00 o'clock of said evening and the morning before she was delivered to the said City of Lawrence, and they believe that she was injured in the yards of Kansas City, or in the yards of the defendant known as the Argentine yards.

That the conversation and promise made to and between defendant, its said employees and these plaintiffs, was made in what 63 these plaintiffs were informed to be the freight office of the defendant in the City of Kansas City, County of Jackson and State of Missouri; and that said servant and employee is unknown to these plaintiffs or either of them, but that said clerk directed them to load said mare at or about 6:00 o'clock and that she would be conveyed in a train known as the Red Ball Freight which freight the defendant and its employees informed these plaintiffs was a freight train; and that said freight collected and hauled no local freight; and that said mare as they were informed, would be deposited in the city of Lawrence about 12:00 o'clock of the night after the evening she was loaded, and that these plaintiffs negligently and carelessly left said mare out of said fast freight train and that the delay incurred thereby, and the rough handling by defendant, as alleged hereinbefore, was the proximate cause of her injuries complained of.

3.

That on or about the 17th day of September, 1907, the plaintiffs delivered to the defendant the said trotting mare, Sousa Mc, together with three other head of trotting and pacing horses, at their yards in the City of Kansas City, County of Jackson, and State of Missouri, about four o'clock P. M. of said day, for the purpose of transporting or conveying the said Sousa Mc, to the City of Lawrence in the State of Kansas, for the purpose of racing her there in races, and the defendant, its agents and servants in charge of the freight or shipping office in said yards, the names of which are unknown to these plaintiffs, undertook and agreed to deliver said mare out of the City of Kansas City, Missouri, into the City of Lawrence and State of Kansas, and said defendant and its employees informed two of these plaintiffs, H. F. Moore and C. E. Robinson

that their regular fast freight train which they called the Red Ball Freight, left their yards in Kansas City enroute to and through the City of Lawrence in the State of Kansas, on or about 10 o'clock of the same evening, and that if said mare was loaded between 64 four o'clock and six o'clock of said evening, she would be conveyed on said freight to the City of Lawrence in the State of Kansas, and there and then said defendant and its employee instructed the said H. F. Moore and C. E. Robinson to load same mare with the other three horses in a box car on the tracks of said defendant at the time herein specified, and the said plaintiffs did so load said mare and the other three head of horses and said defendant and its employee agreed that the defendant would convey and deliver said mare to her said destination and informed these plaintiffs after they were loaded that said fast freight designated as the Red Ball Freight, would take this car of horses out of the City of Kansas City, Missouri, to the City of Lawrence in the State of Kansas about 10 o'clock of the same evening. The plaintiffs allege and complain that the defendant, its agents and servants failed to convey said mare according to said promise, and instead thereof left her with the remaining three horses in a box car on the tracks of said defendant in or about Kansas City and while the said mare was in the said box car on the tracks of said defendant between the city of Kansas City, Missouri, and the City of Lawrence in the State of Kansas, the defendant carelessly and with gross negligence, handled said car in making up its train of cars, and in moving this car around and about over the tracks of said defendant, did finally deliver said mare with the other three of said horses, to the City of Lawrence in said County and State, a distance of Fifty miles or thereabouts, at or about 12 o'clock in the afternoon of the next day, while said mare was hauled and transported from the City of Kansas City, Missouri, to the City of Lawrence in the State of Kansas, on a carrying way freight which collected local freight, and contrary to the promise made to these plaintiffs when the said mare 65 with the other said horses, were loaded according to the directions of the defendant and its employees, but on the contrary, defendant, its agents and servants conducted and managed said train so carelessly and negligently in conveying and transporting the said mare that she was severely bruised, injured and damaged in the following manner, to-wit: That the defendant, its agents and servants in charge of said train of cars and locomotive on defendant's line, between the points aforesaid, and at the times before alleged, did by their gross negligence and carelessness run this train of cars and locomotive, to which was attached the car conveying the said mare, into other cars or train of cars while shifting cars in and out of this train of cars, and at other times in moving the car in which was the said mare and on the track of the said defendant, did roughly and with gross negligence and carelessness handle said car to that the said mare was thereby and therefrom, with great violence knocked down and injured in her left front leg and the front main *tender* and suspensory ligaments thereof were strained, wrenched and bruised so that she was permanently thereby

injured and damaged; which injuries rendered said mare unfit for racing purposes and rendered her unable to earn and win money as a race horse for the balance of the racing season of the year 1907, and did thereby so permanently injure her that she is now unfit and is disqualified for racing purposes as a race horse, and thereby and therefrom, these plaintiffs were damaged as hereinafter alleged.

4.

They say that at the time of the injuries alleged hereinbefore said injuries were due to, and on account of the gross negligence and carelessness of the defendant, its agents and servants 66 in charge of said locomotive and train of cars; and that these plaintiffs, two of them, H. F. Moore and C. E. Robinson, in the exercise of ordinary care protested and attempted to restrain the defendant, its agents and servants from inflicting on the said mare the injuries aforesaid.

5.

They say that they expended the sum of Two Hundred Dollars (\$200.00) in preparing and conditioning the said mare, Sousa Mc for racing, and that at the time of her injuries she was in good racing condition, that she was young and sound, three years old, well bred, had only been in training six months, was good of head and gait, and capable of and could trot three mile heats in two minutes and eighteen seconds per mile on a half mile track in a race of heats for money competing with other horses, and three mile heats in a race for money with other horses over a mile course in two minutes and thirteen seconds, per mile and that she had earned Six Hundred Fifty Dollars (\$650.00) in four starts in races for these plaintiffs in the months of June, July and August 1907, and that she was tractable easily placed in a competitive race, and that she was prepared and educated with a view of racing her in the year of 1908 for larger prize money.

6.

They say that they paid the sum of Eighteen Hundred Dollars (\$1,800.00) for the said mare on or about the first day of May of the year of 1907, and that she was worth, and her reasonable market value was the sum of Twenty-five Hundred Dollars (\$2,500) at the time of the injuries complained of.

7.

They say that the principal value of said mare consisted in and was due to her ability to win money as a race mare and that by reason of and due to injuries hereinbefore alleged, and on account of the gross negligence and carelessness of the defendant, its agents and servants as aforesaid, the racing value of the said mare — thereby entirely destroyed, and that she was thereby and therefrom permanently injured and rendered valueless for racing purposes, and that by reason of her value as a racing mare

and entirely due to her capacity to win money in races she was as alleged, reasonably worth and her market value was the sum of Twenty-five Hundred Dollars (\$2,500.00) and that at this time by reason of the injuries complained of she is only worth and her reasonable market value is the sum of Three Hundred Dollars (\$300.)

8.

They further allege that they have incurred in expenses by reason of the said injuries, the sum of Fifty Dollars (\$50.00) entrance money paid to Secretaries of race meetings for races in which said mare was entered in the months of September and October 1907 and by reason of said injuries, were deprived, as they believe of earning the sum of One Thousand Dollars (\$1,000.00) in prize money; and they incurred in expenses in caring for said mare on account of the injuries complained of, the further sum of Fifty Dollars (\$50.00) and that thereby and therefrom they were damaged in the sum of One Hundred Dollars (\$100.00).

9.

They say by reason of the injuries hereinbefore complained of, that they have been damaged in the sum of One Hundred Dollars (\$100.00) for money expended as aforesaid, and by reason of the injuries to said mare, which rendered her unfit for racing purposes as complained of herein, they are further damaged in the sum of Eighteen Hundred Ninety Dollars (\$1,890.00), and that they are damaged in all by reason of and on account of the gross negligence and carelessness of the defendant, its agents and servants as herein complained of, in the sum of Nineteen Hundred Ninety 68 Dollars (\$1,990.00).

Wherefore they pray judgment against the defendant for the sum of Nineteen Hundred Ninety Dollars (\$1,990.00) the costs of this action and for other proper and necessary relief.

H. H. SMITH,
RITTENHOUSE & RITTENHOUSE,
Attorneys for Plaintiffs.

Endorsed on back of Amended Petition: No. 2807, Ent. State of Oklahoma, Tenth Judicial District. In the District Court, Lincoln County. H. F. Moore, C. E. Robinson and S. H. Smith, Plaintiff, vs. The Atchison, Topeka & Santa Fe Railway Company, Defendant. Amended Petition. Filed Nov. 25 1908. D. J. Norton, Clerk. District Court, Lincoln County, Okla. H. H. Smith, Rittenhouse & Rittenhouse, Attorneys for Plaintiffs.

Whereupon the 2nd day of December 1908, leave is given 69 said defendant to plead to Plaintiff's Amended petition, which order of Court is in words and figures as following to-
wit:

70 Court convened Dec. 2, 1908, at 9 o'clock A. M., Pursuant to adjournment.

Officers present, W. N. Maben, Presiding Judge; D. J. Norton, Clerk; John J. Davis, County Attorney, Chas. B. Wilson, Jr., Deputy County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter; W. Lee Waldrip, Court Crier.

Public proclamation being ordered by the court and announced by the crier for the opening of court, the following proceedings were had and business done, *to-wit*:

No. 2807.

H. F. MOORE et al., Plaintiff,
vs.
A. T. & S. F. R. R. Co., Defendant.

On application leave is granted said defendant five days in which to plead to plaintiffs' Amended Petition.

71 Whereupon the 7th day of December 1908, the defendant files its Demurrer to Plaintiffs' Amended Petition which Demurrer is in words and figures as following, *to-wit*:

72 In the District Court of Lincoln County, Oklahoma.

H. F. MOORE, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, a Corporation, Defendant.

Demurrer.

Comes now the defendant, the Atchison, Topeka & Santa Fe Railroad Company, a corporation and demurs to the amended petition of the plaintiff filed herein for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant and in favor of plaintiff.

COTTINGHAM & BLEDSOE,
HOFFMAN & ROBERTSON,
Attorneys for Defendant.

Endorsements on back of Demurrer: No. 2807. Ent. H. F. Moore, et al., Plaintiff, vs. A. T. & S. F. R. R. Co., Defendant Demurrer. Filed Dec. 7, 1908. D. J. Norton, Clerk District Court, Lincoln County, Okla. Cotttingham & Bledsoe and Hoffman & Robertson, Att'ys.

73 Whereupon the 12th day of December, 1908, said cause comes on for hearing on the defendant's Demurrer to plaintiffs' second amended petition, which ruling of the court is in words and figures as following, *to-wit*:

74 Court convened Dec. 12, 1908, at 9 o'clock A. M. pursuant to adjournment.

Officers present, W. N. Maben, Presiding Judge; D. J. Norton, Clerk; John J. Davis, County Attorney; Chas. B. Wilson, Deputy County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter; R. Lee Waldrip, Court Crier.

Public proclamation being ordered by the court and announced by the Crier for opening of court, the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiff,
vs.
A., T. & S. F. R. R. Co., Defendant.

Comes now the plaintiff- and defendant by their respective counsel, whereupon counsel for the defendant submits a general demurrer to the petition of said plaintiffs, and the court after hearing the argument of counsel and being fully advised in the premises, overrules said demurrer, — which ruling of the court counsel for the defendant duly excepts. Thereupon said cause comes on for hearing on the special demurrer of defendant to plaintiffs' petition, and the court after hearing the argument of counsel and being fully advised in the premises sustains the special demurrer, to which ruling of the court counsel for plaintiff's duly excepts. On application, plaintiffs are given leave to amend their petition by an interlineation and the defendant is given ten days in which to file its answer to said amended petition.

75 Whereupon the 12 day of December 1908, the plaintiffs file their amendment to their second amended petition, which amendment is in words and figures as following, to-wit:

76 STATE OF OKLAHOMA,
Tenth Judicial District, ss:

In the District Court of Lincoln County, Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY Co., Defendant.

Amended Petition.

Now come the plaintiffs and for their cause of action herein further complain and allege:

I.

Amending their amended petition already filed herein, by adding after the word "races" in line 4 on page 2 of said amended petition, the following words: "and the said defendant, its agents and servants

were informed by these plaintiffs that the said mare, Sousa Mc, was a race mare, and she was being shipped there for said purpose."

H. F. MOORE,
C. E. ROBINSON, AND
S. H. SMITH,
By H. H. SMITH AND
RITTENHOUSE & RITTENHOUSE,
Attorneys for Plaintiffs.

Endorsements on back of Amended Petition, No. 2807, Ent. District Court, County of Lincoln. H. F. Moore, et al., Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Co., Defendant. Amended Petition. Rittenhouse & Rittenhouse, Chandler, Oklahoma, Attorneys for Plaintiff. Filed Dec. 12, 1908. D. J. Norton, Clerk District Court, Lincoln County, Okla.

77 Whereupon the 29th day of December 1908, the defendant filed its answer to plaintiffs' amended petition, which answer is in words and figures as following, to-wit:

78 In the District Court of Lincoln County, State of Oklahoma,

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Answer.

Comes now the defendant above named, with leave of court first obtained, and for its answer to the petition and amended petition of the plaintiffs on file herein, says:

First. That it admits its incorporation as alleged in said petition and denies each, all and every of the other allegations therein contained, except such as are hereinafter specifically admitted.

Second. For a second and further defense to said petition -- facts to be that on or about the 16th day of September, 1907, then were delivered to it at Kansas City, Missouri, four head of horses to be shipped to Lawrence, Kansas, and at said time the defendant and plaintiffs herein, entered into a written contract governing the transportation of said horses, a true and correct copy of which said contract is hereto attached, marked "Exhibit A" and made a part of this answer.

That by the terms of said contract it was provided:

"First. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market."

That said contract further provided:

"Third. That shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, it being understood that the rate given is based upon such limit of value

tion, which is the highest value accepted for the lower rate (animals of a higher value being charged a higher rate); and in case of loss or damage from any cause for which the Company may be liable, payment shall be made therefor only on the basis of the actual cash value at the time and place of shipment, but in no case to 79 exceed the following, which is understood not to exceed the value as held by the shipper, to-wit:

each horse, or pony, gelding, mare or stallion, mule or jack, per head \$100."

Defendant alleges that said contract was entered into and executed by the parties hereto, the plaintiffs and defendant herein, voluntarily and for a valid consideration and that said contract is the only contract entered into and executed by said parties governing the shipment of said cattle. Defendant avers that if said injury happened as alleged in said petition, that this defendant's liability cannot exceed the sum of \$100.00 for said injuries so sustained, as alleged in said petition.

That said contract further provides:

"Seventh. The shipper further agrees that at the end of every division or wherever the train conduct shall be changed, on request of the conductor, the party in charge of the stock, (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and everything unusual or exceptional that may have happened to the stock, specifying all of his complaints as to the manner in which the train and stock were handled on such division; and whenever the same shall be unloaded at any station, before they leave such station the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at said station, specifying all complaints as to the manner in which the stock have been handled or treated at such station and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements as herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damage to said stock from whatever cause."

Defendant alleges that said contract was entered into and executed by the parties hereto, the plaintiff and defendants herein, voluntarily and for valid consideration and that said contract is the only contract entered into and executed by said parties governing the shipment of the said horses. That the plaintiffs or any- 80 one acting for them, who was in charge of said stock, made out and signed statements showing the condition of said stock, the damage thereto, if any, or the time and place and cause thereof, nor did the plaintiffs or anyone for them serve such notice on the conductor in charge of said train or agent in charge of the station at Lawrence, Kansas, where this defendant has such agent, or gave to such agent any notice as provided by the provisions of

said contract, nor gave to its station master or anyone in charge of said station authorized to receive any such notice, and the defendant alleges and avers the fact to be that no such notice was served upon its conductor in charge of the train upon which said stock were transported, or upon its station master or agent at the city of Lawrence.

The said contract further provided:

"Eighth. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence. It is agreed that as a condition precedent to his right to recover *to* any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim thereof to some officer of the Company, or to the nearest station agent or if delivered to the consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been moved from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery to any and all such damages. The written notice herein provided for shall not be waived by any person except the general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claims therefor be presented to the Company within ninety-one days after the same

may have occurred."

81 Defendant alleges that said contract was entered into and executed by the parties hereto, the plaintiffs and defendant herein, voluntarily and for valid consideration; that said contract is the only contract entered into and executed by the parties hereto governing the shipment of said horses. Defendant avers that the said horses were unloaded and taken from the cars at Lawrence, Kansas, at which place this defendant had a station agent, that when plaintiffs unloaded said horses they were well aware of their condition and knew whether they had sustained any injury or damage, and that the plaintiffs nor any one acting for them, prior to the commencement of this action, or before the removal of said horses from the car, made any demand in writing for any damages sustained and never at any time gave notice in writing of the plaintiffs' claim for damages, loss or injury to such stock, to the defendant or any of its officers or agents, before such stock was removed from the place of destination and before such stock was intermingled with other stock. Defendant further alleges that plaintiffs or any one acting for them, made any written claim or presented the same

to this Company within ninety-one days after the said damages were alleged to have occurred.

Said contract further provided:

"Twelfth. It is distinctly agreed that all prior understanding concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock for said shipment are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock; and said shipper thereby expressly waives all claims for damage arising from breach of any prior agreement with respect to the transportation of said stock or the furnishing of cars therefor, and hereby releases the company from any and all liability therefor."

Defendant alleges that said contract was entered into and executed by said parties hereto, the plaintiffs and defendants herein, voluntarily and for valid consideration and that said contract is

82 the only contract entered into and executed by the parties governing the shipment of said horses; that if the plaintiffs had any understanding with the agent of this defendant at Kansas City at the time said stock were delivered to this defendant, that all prior negotiations of said stock are merged in this contract of shipment.

That said contract heretofore referred to and hereto attached, marked "Exhibit A" and made a part of this answer, was entered into and executed in the state of Missouri and that said contract is a Missouri contract and under the terms and conditions of said contract, its performance was to be in the State of Kansas; that there is no specific statute in force in the State of Missouri governing said contract or shipment, but the law as interpreted by the Appellate and Supreme Courts of the said State of Missouri, has upheld the said contract and the terms and conditions thereof have been held to be valid and binding between parties entering into the same; that under the laws of the State of Kansas, in which said contract was to be performed, the First, Third, Eighth, and Twelfth provisions and the other provisions of said contract, except such as are hereinafter specifically alleged, have been upheld by the Supreme Court of the State of Kansas, as valid and binding between the parties entering into said contract; that under the statute of the State of Kansas, Section 13, Chp. 124, Laws of 1883 (Sec. 17, Chp. 69, Gen. St. 1897) provides:

"No railroad company shall be permitted, except as otherwise provided by regulation or order of the Board of Railroad Commissioners, to change or limit its common law liability as a common carrier."

That The Board of Railroad Commissioners of the State of Kansas have by an order and rule permitted the common carriers in the State of Kansas to limit their common law liability by a stipulation

83 in the contract for shipment of live stock, limiting the amount for which the railroad company shall be liable in case of loss or injury, and the said Board has by its per-

mission and order made said provision of said contract valid and binding between the parties thereto.

That there is no special statute in force in the State of Kansas affecting the First, Seventh, Eighth and Twelfth provisions of said contract, but said provisions and by the laws of the State of Kansas as determined by the judicial proceedings of the said State of Kansas, are in full force and effect and are valid and binding provisions.

Wherefore, defendant having fully answered prays that it may go hence and recover its costs herein expended without day.

COTTINGHAM & BLEDSOE.

HOFFMAN & ROBERTSON.

GEO. M. GREEN,

Attorneys for Defendant.

84 STATE OF OKLAHOMA,
County of Logan:

Affidavit.

Geo. M. Green, of lawful age, being first duly sworn upon his oath, says that he is one of the Attorneys of the Atchison, Topeka and Santa Fe Railway Company in the State of Oklahoma, and one of the Attorneys in the above case. That he has read the above and foregoing answer to said plaintiff's petition and amended petition herein and knows the contents hereof and that each, all and every of the allegations contained and set forth in said answer are true in substance and in fact, as he is informed and verily believes; that he makes this verification, because the general officers of said defendant, which is a corporation organized and doing business under the laws of the State of Kansas, are absent from the State of Oklahoma.

GEO. M. GREEN.

Subscribed and sworn to before me this 14th day of November
A. D. 1908.

[SEAL.]

BERTHA SCHUPP,
Notary Public.

My Commission expires July 2, 1910.

Form 67-A. Regular.

Read this contract carefully as numerous changes have been made.

Live Stock Contract (Limited Liability).

The Atchison, Topeka & Santa Fe Railway Company.

Rules and Regulations for the Transportation of Live Stock.

NOTICE: This Railway has two rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuation therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract:

No station agent or station master of this Company has any authority to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of car will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company has power to make such contract.

No. of cars: —. Initials: A. T. 29297.

This agreement made at Kansas City, No. — station, 9/16, 1907, between and on behalf of the above named Railway Company, hereinafter called the Company and the connecting carriers severally, of the first part, and H. F. Moore of K. C., hereinafter called the shipper, of the second part.

Whereas the Company transports live stock as per rules and regulations, all of which are made a part of this contract.

Now, therefore, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, but at the lower rate applicable to this form of live stock described below, as herein provided, viz.:

One cars, said to contain four head of horses, consigned to H. F. Moore, at Lawrence, Kansas, to be carried by said Company to said place of destination, if the same be upon the road of said Company, but if such destination be beyond the road of said Company, then to deliver or tender such shipment at the connecting point on the lines of its road to any convenient connecting carrier, selected by it, to be forwarded to the place of destination, and on so delivering or tendering to such connecting carrier all liability whatever of the Company for carriage of said stock shall be thereby ended, to be understood that the Company assumes no liability whatever on account of the carriage of said stock beyond its road, and that the

Company shall not be liable for any damage to, injury or delay of said stock, or for anything whatever that may happen to the same after such delivery, or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to a succeeding carrier, and the responsibility of each carrier shall not begin until it receives said stock from the consignor or from the connecting carrier.

It is also agreed that the Company shall not be held liable for any damages whatever that may accrue to the shipper or to the stock (in case the other carrier or carriers shall refuse to receive, carry or deliver the stock on payment or tender of said rates) beyond 87 the difference between the amount the shipper may have been compelled to pay and the rate given, but in no event in excess of the lower joint through tariff rate in force and applicable to shipments under this form of contract; thirty days' notice in writing shall be first given by the shipper before such refund shall be made. The guaranty of any through rate shall not in any wise be construed to extend the liability of the Company beyond its road or for delivery or tender thereof, except as hereinbefore stated.

Where the live stock is delivered at the Union Stock Yards, Chicago, Illinois, the lower rate applicable to this contract shall include also the terminal charge of \$2.00 per car as provided in the Tariffs in addition to the rate in Chicago, for transfer from Corwith station of the A. T. & S. F. Ry. Co. in Chicago to and delivery at said Union Stock Yards, the rate to Chicago, covering only transportation to and Corwith station; which terminal charge and rate the shipper agrees to pay.

In consideration of the foregoing, it is further mutually agreed 88 between the parties hereto as follows:

First. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular hour, nor in season for any particular market.

Second. The Company will stop cars for watering or feeding only at such of its stations as it has at the time adequate facilities for such purposes, and only when requested to do so in writing by the shipper or attendant in charge; and the second party shall not confine his stock in the cars for a longer period than 28 consecutive hours, without unloading same for rest, feeding and watering for a period of at least 5 consecutive hours, unless prevented from so doing

by storms or other accidental causes.

Third. The shipper hereby represents and agrees that his 88 live stock does not exceed in value the prices below named, it being understood that the rate given is based upon such limit of valuation, which is the highest value accepted for the lower rate (animals of higher value being charged a higher rate); and in case of loss or damage from any cause for which the Company may be liable, payment shall be made therefor only on the basis of the actual cash value at the time and place of shipment, but in no case to exceed

the following, which is understood not to exceed the value as held by the shipper, to-wit:

For each horse or pony, gelding, mare or stallion, mule or jack, per head.....	\$100.
Each Ox, bull or steer, per head.....	50.
Each cow, " "	30.
Each calf, " "	10.
Each hog, " "	10.
Each sheep or goat, " "	3.

Fourth. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand in writing another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars, or any of them, which were not so reported to the Company's said agent in writing.

89 The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part or of his agents or employees, to do so and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever and specially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading by the shipper or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

Fifth: That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the company or lots awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the company shall not be liable for any loss or damage to said stock while being so in the shipper's

charge, and so cared for and attended to by the shipper or his or their employees as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the 90 shipper's orders, and shall be deemed the shipper's employés while so engaged, and the company shall in no wise be liable for their acts or negligence.

Sixth: The shipper hereby assumes and releases the Company from risk or injury or loss which may be sustained by reason of any delay in such transportation of said stock, or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, in crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

Seventh: The shipper further agrees, that at this end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional

91 that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damage to said stock from whatever cause.

Eighth: In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his

agent in charge of the stock will give notice in writing of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for cannot and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the company within ninety-one days after the same may have occurred.

92 Ninth. It is further agreed that no suit or action against the Company for any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such *of* cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

Tenth. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in the tariffs or schedules for similar shipments at owner's risk, in view of the limitations and exemptions contained in the agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk.

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to a connecting carrier, and the last carrier to the place of destination under the provisions of this agreement, and no carrier or carriers shall be liable to any event, for any loss or damage which may occur upon the road

or roads, connecting or otherwise, of any other carrier or
93 carriers; that each of the connecting carriers shall transport
said stock over its own road under said through rate, in accordance with the provisions of this agreement and that this agree-

ment is entered into by the above named Company in its own behalf and as agent for, and, severally and not jointly, on behalf of each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract need be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers accepting the shipment as the several contracts between said shipper and each of such carriers respectively, providing for their mutual rights and obligations.

Where any succeeding or connecting carrier, in case the live stock are to be forwarded beyond any road, shall decline to accept and carry at the through rate except under its own regular form of live stock contract (limited liability) then (if the shipper or some agent for him shall not accompany the shipment) any agent of the carrier tending or forwarding the shipment is hereby authorized by the shipper to execute on his behalf any such live stock contract for transportation over such connecting line, so that the shipper may receive the benefit of any through or lower rate applicable under such contract.

Eleventh. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employee's negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people

or community. In case the carrier shall be obliged to pay
94 damages on account of the loss or injury to said cattle, it
shall be subrogated to the shipper's right to pay any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

Twelfth. It is distinctly agreed that all prior undertakings, concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock; and said shipper hereby expressly waives all claims for damage arising from breach of any prior agreement with respect to the transportation of said stock or the furnishing of cars therefor, and hereby release the Company from any and all liability therefor.

Thirteenth. In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability,

and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named.

Fourteenth. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions of parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

95 The signature of the shipper or his agent hereto is and shall be a conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY AND CONNECT-
ING CARRIERS (SEVERALLY),
By D. S. FARLEY,
D., *Its Agent.*

H. F. MOORE, *Shipper,*
By S. E. DU BOIS, *Agent.*

Witness,

NOTE.—Agents must see that this contract is signed *the* the shipper, or his name by his authorized agent before commencing to load any of said stock, and that all blanks are filled in and point of destination inserted must not be beyond a line road in the Santa Fe Route, unless special instructions otherwise provide.

Not negotiable.
"Exhibit A".

On Back of Live Stock Contract.

We the undersigned owners of the live stock mentioned in the within contract, in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass, shall not be liable to any of us for any injury or damage of any kind suffered by us or any of us while in charge of said live stock or while in course of transportation on our return passage.

And whereas travel by freight trains is necessarily more dangerous than upon passenger trains, we hereby assume all risk incident thereto and of the manner in which such trains are operated, and we agree to identify ourselves and each of us whenever required to do so by any conductor and we hereby release said 96 Company, and each and every connecting carrier which may honor said pass, from all liability for any injury or damage suffered by any of us, if injured while violating any regulations of said Company, and we further agree to specially observe the following regulations:

First. Remain in a safe place in the caboose attached to the car while the train is in motion.

Second. Get on and off said caboose only while the same is still or stationary.

Third. Will not get on or be on any freight car while switching is being or is to be done at stations or other places or at any other time.

Fourth. Will not walk or stand on any track or station or other places at night without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is usually made safe to alight from trains, but are advised of the fact that freight trains frequently stop upon bridges and at places along the line of the road where it is not safe to alight from the caboose without first ascertaining by examining the surrounding ground that it is safe to alight thereat, and will therefore not attempt to alight from the caboose or car whenever the car may stop for any purpose without first making careful examination from the steps of the caboose (with a lighted lantern if at night time) and ascertain the condition of the ground, and first determine by every available means that it is safe to step down from the caboose or car at such place or places, and in this respect will not rely, except at our own risk, on any assurance or statement of the conductor or other railway employé.

In consideration of the foregoing and of the free transportation we and each of us hereby agree to assume all the risk of injury from alight-, from the caboose or car on account of the condition

of the ground or on any account, and agree that in case of
97 any accident, wreck, mishap or other casualty, however
caused, in which we or either of us may or shall receive any personal injury, the one so injured shall notify in writing the Company or carrier upon whose road the accident or casualty may have happened through his home agent or through the nearest and most convenient local agent of such company or carrier, of such injury, and of the time, place and all the circumstances and extent thereof, and of the names and addresses of witnesses, within thirty days after the happening of such *un*injury, and as a condition precedent to the right to maintain any suit or action or recovery on account of such alleged injury; and it is understood that such notice in writing cannot be waived by such home or local agent of the Company or carrier; and we and each of us further agree that we or any of us shall not have any cause or right of action to maintain any action for any injury except that of which notice as aforesaid shall be given to said Company or carrier, as aforesaid, and that no Company or carrier shall be liable for or on account of any injury or damage occurring on the road of any other Company or carrier.

H. F. MOORE,

Parties in Charge of and Accompanying Live Stock.

L. E. DU BOIS, *Witness.*

Endorsements on back of answer: No. 2807. Ent. In the District Court of Lincoln County, State of Oklahoma. H. F. Moore, C. E. Robinson, S. H. Smith, Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Company, Defendant. Answer. Filed Dec. 29, 1908. D. J. Norton, Clerk District Court, Lincoln County, Okla.

98 Whereupon the 26th day of March, 1909, the plaintiffs file their Motion *the Strike Defendant's Answer to the Amended Petition of Plaintiff*, which Motion is in words and figures as follows, to-wit:

99 In the District Court of Lincoln County, State of Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Motion.

Comes now the plaintiffs in the above entitled action and move the court to strike all of the answer of the defendant filed herein to the petition and amended petition of the plaintiffs, or the second paragraph on page five (5), beginning with the words "that said contract" etc., inclusive of the balance of page five (5), and all of said paragraph to the word "wherefore" on page six (6), for the reason that the same is redundant and irrelevant, and for the further reason that the said answer shows that the contract therein plead in said answer was executed on or about the 16th day of September 1907 at Kansas City, Missouri, and that thereafter the horses which were the subject matter of said contract, were shipped from Kansas City in the State of Missouri to Lawrence in the State of Kansas, and from said allegations in said answer and the subject matter of said contract this court herein takes judicial knowledge of the fact that this was a contract for the shipment of said horses over said defendant's railway and was such a contract which was to be performed partly in the State of Missouri and partly in the State of Kansas. And that portion of the answer herein which refers to the laws of Kansas as controlling said contract can form no part of the issues in this cause of action.

H. H. SMITH &
RITTENHOUSE & RITTENHOUSE,
Attorneys for Plaintiffs.

Endorsements on back of Motion: No. 2807. Ent. H. F. Moore, et al., vs. A. T. & S. F. Ry. Filed March 26, '09. D. J. Norton, Clerk.

100 Whereupon the 13th day of April 1909, the plaintiffs filed their Demurrer to defendant's answer, which Demurrer is in words and figures, as follows, to-wit:

101 In the District Court of Lincoln County, State of Oklahoma,

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Demurrer.

Now come the plaintiffs and demur to the second paragraph of the answer of the defendant filed herein to the plaintiff's petition and amended petition, on the ground that it appears upon the face of said answer that the same does not state facts sufficient to constitute a defense in law.

H. H. SMITH,

RITTENHOUSE & RITTENHOUSE,

Attorneys for Plaintiffs.

Endorsements on back of Demurrer: No. 2807. Ent. District Court of Lincoln County. H. F. Moore, et al., Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Demurrer. Rittenhouse & Rittenhouse, Chandler, Oklahoma. Attorneys for Plaintiffs. Filed April 13, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

102 Whereupon the 13th day of April 1909, the defendant was given to April 19, 1909, to investigate its authorities, which Order of the Court is in words and figures as follows, to-wit:

103 Court convened April 13, 1909, pursuant to adjournment. Officers present, W. N. Maben, Presiding Judge; D. J. Norton, Clerk, by W. L. Johnson, Deputy, John J. Davis, County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter; and R. Lee Waldrip, Court Crier.

Public proclamation ordered by the court and announced the Crier for the opening of court, the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiffs,

vs.

THE A. T. & S. F. R. R. Co., Defendants.

Comes now the plaintiffs and defendant by their respective counsel, whereupon counsel for the plaintiff submits a motion to strike certain portion of the defendants' answer, and on application defendants are given until April 19, 1909, to investigate authorities.

104 Whereupon the 19th day of April 1909, leave is granted the defendant to file its Amendment to their answer, which order of the Court is in words and figures, as follows, to-wit:

105 Court convened April 19, 1909, at 9 o'clock A. M. pursuant to adjournment.

Officers present, W. N. Maben, Presiding Judge; D. J. Norton, Clerk of the District Court; John J. Davis, County Attorney; L. E. Martin, Sheriff; W. L. Ducker, Court Reporter; R. Lee Waldrip, Court Crier.

Public proclamation ordered by the court and announced by the crier for the opening of court, the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiffs,
vs.
THE A., T. & S. F. R. R. Co., Defendant.

On application leave is given defendant to file amendment to its answer, and it is further ordered by the Court that said cause be set for trial May 3, 1909.

106 Whereupon the 18th day of April 1909, the defendant filed its amendment to their answer, which amendment to answer is in words and figures as follows, to-wit:

107 In the District Court of Lincoln County and State of Oklahoma.

C. E. ROBINSON, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Amended Answer.

Comes now the defendant and by leave of court as had and obtained, files the following amendment to its answer, not waiving any matter pleaded in the said answer, and filing the following amendment as supplemental thereto and as an amendment thereto.

The defendant alleges and avers the fact to be that said shipment was from the State of Missouri into the State of Kansas, and was, therefore, an Interstate shipment, and said shipment was made upon a tariff of rates, which was duly filed and approved by the Interstate Commerce Commission, and which said tariff had been posted in this defendant's depots, both at Kansas City, Missouri, and at Lawrence, Kansas, and which was in full force and effect at the time said shipment moved; that said tariff was promulgated, filed and published in accordance with an act of Congress, commonly known as the Interstate Commerce Act, which was approved June 29, 1906; that by said tariff which was filed with the Interstate Commerce Commission, and posted as provided by law, as above set out, and which was approved by the said Interstate Commerce Commission,

and which was the legal tariff governing Interstate shipments of freight and live stock, it was provided as follows:

108 (A) Rates named in section two apply on shipments of ordinary livestock, where contracts are executed by shippers on blanks furnished by these companies, and are bases on the declared valuation by the shipper at time contract is signed, not to exceed the following:

Each horse or poney (gelding, mare Stallion) Mule or Jack	\$100.00
Each Ox, Bull or Steer	50.00
Each Cox	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00

(B) Where the declared value exceeds the above an addition of twenty-five per cent will be added to the rate for each one hundred per cent or fractional part thereof of additional declared valuation per head.

Animals exceeding in value \$800.00 per head will be taken only by special arrangement.

(C) Table off rates named will be charged on shipments of live stock made with limitation of company's liability at common law, and under this status shippers will have the choice of executing or accepting contracts for shipments of live stock with or without limitation of liability and rates accordingly."

That said shippers obtained the benefit of such reduced rate applicable to the value fixed in the written contract governing said shipment of horses; that said shipment, set out in the petition, was made in all respects, under the said tariff, so filed with the Interstate Commerce Commission and the same is in all respects, governed by the Act of Congress of the United States, above set out, commonly known as the Interstate Commerce Act, and that the Rights and liabilities of the defendants to this action are determined and fixed by said Act of Congress, and in deciding the rights of the parties hereunder a consideration of said Act of Congress is necessary, and that the rights and liabilities of the parties to this action cannot be fixed or determined except by a construction of said Act of Congress.

That the liability of the defendant under this Bill of Lading, and the construction of the said Act of Congress has never been clearly and unequivocally adjudicated and settled by the Supreme Court of the United States and that the construction of said statute in respect to the questions presented herein under said Bill of Lading are still unsettled by said Supreme Court.

And defendant further alleges that there is a controversy between the plaintiff and the defendant in this action, above set out, and that the decision of this case and of the rights and liabilities of the parties thereto requires an adjudication as to the proper construction of said Act of Congress and a settlement of the controversy between the parties as to the meaning and effect thereof.

Wherefore, defendant prays judgment as in the answer, to which this is an amendment, prayed.

COTTINGHAM & BLEDSOE,
HOFFMAN & ROBERTSON,
GEO. M. GREEN,

Attorneys for Defendant.

Endorsements on back of amendment to answer: 2807. Ent. District Court, Lincoln County, C. E. Robinson, vs. A., T. & S. F. Ry. Co. Amendment to Answer. Filed April 19, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

110 Whereupon the 28th day of June 1909, the plaintiffs file their motion to strike the defendant's answer to plaintiffs' petition and amended petition, which motion is in words and figures as follows, to-wit:

111 In the District Court of Lincoln County, State of Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Motion.

Come now the plaintiffs in the above entitled action and move the court to strike all of the answer of the defendant filed herein to the petition and amended petition of the plaintiffs, of the second paragraph on page five (5), beginning with the words "That said contract" etc., inclusive of the balance of page five (5), and all of said paragraph to the word "wherefore" on page six (6), for the reason that the same is redundant and irrelevant, and for the further reason that the said answer shows that the contract therein plead in said answer was executed on or about the 16th day of September 1907 at Kansas City, Missouri, and that thereafter the horses which were the subject matter of said contract, were shipped from Kansas City in the State of Missouri to Lawrence in the State of Kansas, and from said allegations in said answer and the subject matter of said contract this Court herein takes judicial knowledge of the fact that this was a contract for the shipment of said horses over said defendant's railway and was such a contract which was to be performed partly in the State of Missouri and partly in the State of Kansas. And that that portion of the answer herein which refers to the laws of Kansas as controlling said contract can form no part of the issues in this cause of action.

H. H. SMITH &

RITTENHOUSE & RITTENHOUSE,

Attorneys for Plaintiffs.

Endorsements on back of Motion: No. 2807. Ent. District Court, County of Lincoln. H. F. Moore, et al., Plaintiffs vs. Atchison, Topeka & Santa Fe Railway Co., Defendant. Motion. Filed June 28, 1909. D. J. Norton, Clerk District Court, Lincoln County, Oklahoma.

Whereupon the 9th day of July 1909, the plaintiffs file
112 their Supplemental Motion to Strike defendant's answer to
plaintiffs' Amended Petition, which Motion is in words and
figures as following, to-wit:

113 STATE OF OKLAHOMA,
Tenth Judicial District, ss:

In the District Court of Lincoln County, Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., Defendant.

Motion to Strike.

Comes now the above named plaintiffs and after obtaining leave of the court herein move to strike from the answer of the defendant all of said answer, beginning with the word "second", on page one in line eight down to the word "wherefore" on page six, line fifteen of said answer on the following grounds to-wit:

First. That said second paragraph of said answer is ~~irrelevant~~, redundant and frivolous.

Second. That said answer contains no allegations which constitute a legal defense to plaintiffs' cause of action.

Third. That the allegations in said answer and alleged contract therein set out constitute no legal defense to plaintiffs' cause of action under the laws of Missouri where said contract was executed.

Fourth. And all of said amended answer because same is no defense in law.

H. F. MOORE,
By H. H. SMITH &
RITTENHOUSE & RITTENHOUSE,
Attorneys for Plaintiffs.

Endorsements on back of Motion: No. 2807. Motion. Filed July 9 1909. D. J. Norton, Clerk District Court, Lincoln County.

114 Whereupon the 12th day of July 1909, said cause comes on for hearing upon the plaintiffs' Motion and Supplemental Motion to strike the defendant's Answer and Amendment thereto to plaintiffs' Amended Petition, which Motion is overruled by the Court and is in words and figures as follows, to-wit:

115 Court convened July 12 1909, pursuant to an order of the Supreme Court fixing term of court for Lincoln County, Oklahoma.

Present Hon. Wm. M. Boles, presiding Judge; D. J. Norton, Clerk; John J. Davis, County Attorney; L. E. Martin, Sheriff; and Brady Brown, Court Bailiff.

Public proclamation being ordered by the court and announced by the crier for the opening of court the following proceedings were had and business done, to-wit:

No. 2807.

H. F. MOORE et al., Plaintiffs,
vs.
THE A., T. & S. F. R. R. Co., Defendant.

Come now the plaintiffs and the defendant by their respective counsel whereupon counsel for the *defendant* submits a motion to strike defendant's answer and the amendment thereto from the files. And the court being fully advised in the premises overrules said motion, to which ruling of the court counsel for the *defendant* duly excepts.

On Application plaintiff-*is* given ten days to file reply.

116 Whereupon the 12th day of July 1909, the Plaintiffs filed their reply to the defendant's Answer and Amendment thereto, which Reply is in words and figures as following to-wit:

117 STATE OF OKLAHOMA,
Tenth Judicial District:

In the District Court of Lincoln County, Oklahoma.

H. F. MOORE, S. H. SMITH, C. E. ROBINSON, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Reply.

Comes now the above entitled plaintiffs in this action herein and after obtaining due leave of court to file his reply to defendant's answer and Amended Answer, *denying* each and every allegation therein contained, and affirmatively alleges, that if a binding contract was entered into at the time of the shipment herein with this plaintiff or his agent, which is denied, limiting recovery for each horse and the said mare to one hundred dollars, that said value was arbitrarily printed in said contract of shipment as evidenced by said answer, and no value was fixed by the shipper, and no representation made to the defendant company or its agents that said mare was worth or valued at not exceeding one hundred dollars, and no such value was relied

on by the defendant in fixing a lower rate of shipment, which plaintiff alleges was the regular and not a lower rate, and that said contract if as alleged in defendant's original amended answer, was made in, and was a Missouri contract, which plaintiff admits, it was not a contract of limitation and that portion of said contract is inapplicable and void under the laws of said state; and for further reason, defendant, its agents and servant, at the time of said shipment, knew or in the exercise of caution and care should have known that the value of said mare was greatly disproportionate to the alleged fixed value in said contract of shipment, and therefore void in law.

C. E. ROBINSON,

H. H. SMITH &

RITTENHOUSE & R—,

Attorneys for Plaintiff.

Endorsements on back: No. 2807. Ent. Reply. Filed July 12, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

118 Whereupon the 20th day of August 1909, the defendant files its Demurrer to the plaintiffs' Reply to the defendant's Amended Answer, and Amendment Thereto, which Demurrer is in words and figures as follows, to-wit:

119 In the District Court of Lincoln County, State of Oklahoma.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Demurrer.

Comes now the above named defendant and demurs to the reply of the plaintiff- in the above entitled action and for grounds of said demurrer alleges that said reply does not state facts sufficient to constitute a defense to the answer and amended answer of the defendant on file herein.

COTTINGHAM & BLEDSOE,

CHAS. B. WILSON, JR.,

Attorneys for Defendant.

Endorsements on back of Demurrer: No. 2807. Ent. In the District Court of Lincoln County, Oklahoma. H. F. Moore, C. E. Robinson and S. H. Smith, Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Company, Defendant. Filed Aug. 20, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

120 Whereupon the 6th day of December 1909, the plaintiffs — their Exceptions to the depositions of W. R. Smith and James T. Gilmore, which Exceptions is in words and figures as following, to-wit:

121 In the District Court of Lincoln County, State of Oklahoma.

H. F. MOORE et al., Plaintiff,
vs.
A., T. & S. F. Ry. Co., Defendant.

General Exceptions to Depositions.

Now comes the plaintiff in the above entitled action and excepts to and moves the court to suppress the deposition of the witness W. R. Smith and James P. Gilmore, taken at Kansas City on or about the 21st day of November 1908, to be read in evidence on behalf of the defendant in this action for the following reason, to-wit:

1. Because said deposition does not tend to prove any of the issues in this case and is irrelevant, incompetent and immaterial, and for the further reasons that it is alleged in defendant's answer that the purported contract alleged in said answer made as to said shipment is governed by and was made under the laws of the United States, controlling Interstate shipments, and under said laws the said contract as pleaded in defendant's answer and amended answer is void, and the deposition of the witness tending to prove the validity of the limitation of liability in said contract, becomes immaterial and incompetent.

2. And for a further reason that the deposition of the witness in reference to the notices required in said contract has no application and tends to prove no issues in this case, and is incompetent, irrelevant and immaterial.

H. F. MOORE,
H. H. SMITH AND
RITTENHOUSE & RITTENHOUSE,
His Attorneys.

Endorsements on back of Exceptions to Depositions: No. 2807, Ent. Moore vs. A., T. & S. F. Exceptions to Deposition. Filed Dec. 6, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

122 Whereupon the 17th day of December, 1909, the defendant filed its objections to the Depositions of H. F. Moore, which exception to deposition is in words and figures, as follows, to-wit:

123 In the District Court of Lincoln County, State of Oklahoma
No. —.

H. R. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Exceptions to Depositions.

Comes now the above named defendant in the above entitled action and makes the following exceptions to depositions on file in the above entitled case, as follows, to-wit:

Deposition of H. F. Moore.

Q. Did you make any protest to the persons in charge of the train.

A. Yes sir, I think we swore at about every man that passed around the car, and there was one fellow who appeared to be a switchman, don't know his name, he said the conductor of the fast freight had got the billing for these horses and was ordered to take them out, but that a mistake had been made some way and that they were not made into his train and that the cars were so thick in the yards that he could not help shove them around.

Defendant objects to the answer of the above and foregoing question for the reason that the same is not responsive, hearsay and it is not shown that the party making the statement was an employee of the defendant.

Defendant objects to question 37 and to the answer thereto:

Q. Did he tell you what it was and did you pay for it? If not state what the conversation was.

A. He said the conductor of the Red Ball had the bill of these horses the night before and showed it to him and said that they had left them in the yards. He did not know just what the freight was, but he could pay about what it was and he would collect the balance, if any, when freight bill was returned. I don't recollect what the freight was, about \$20.00 we paid him and then 124 \$2.00 when we got the bill a couple of days later.

Defendant objects to the answer for the reason that it is not responsive, is hearsay, incompetent and not a proper issue in this case.

Defendant objects to question 47 and to the answer thereto:

Q. Do you know how fast Susie Me could trot?

A. Three miles on a mile track. I think she could trot three time-around in 2:15 or 2:16 in good condition.

Defendant objects to the answer for the reason that it is not responsive, is a conclusion of the witness, incompetent, irrelevant and immaterial.

Defendant objects to question 48 and to the answer thereto:

Q. Did you ever see her trot that fast?

A. I think I never timed her that fast, but I think I saw her trot and timed her three miles about 2:00 on a half mile track at Clay Center, Kansas, and at Topeka, Kansas. It is my opinion that the performance was as good as 2:16 on a mile track.

Defendant objects to the answer for the reason that it is not responsive, being an opinion and conclusion of the witness and incompetent, irrelevant, and immaterial.

Defendant objects to question 49 and to the answer thereto:

Q. When you saw her trotting three heats around 2:20 and you timed her three heats around 2:20 was she trotting as fast as she could?

A. I think not.

Defendant objects to the question and answers for the reason that it calls for an opinion of the witness, and for the reason that the answer is a conclusion and opinion of the witness, not the best evidence, and incompetent, irrelevant and immaterial.

Defendant objects to question 50 and to the answer thereto:

Q. State the reason as to why she was not trotting as fast as she could.

A. We expected to race her as a four-year old and did not want to get her marked very fast, so we took second money or as near as we could get.

Defendant objects to the question for the reason that it is incompetent, irrelevant and immaterial and not a proper issue in this case; and to the answer thereto for the reason that the same does not prove or tend to prove any issue in this case, is not the proper measure of damages, speculative, too remote, incompetent and irrelevant.

Defendant objects to question 51 and to the answer thereto:

Q. What in your opinion was a reasonable value in the market of Susie Mc at the time that she was injured, or about September 20, 1907?

A. I think she was worth and would have brought at public auction two thousand dollars and I know considering her poor condition and poor opportunity that she was worth a great deal more than that.

Defendant objects to the question for the reason that it tends to vary the terms of a written contract of shipment, is not the best evidence, and to the answer thereto for the reason that the same is conjecture and a conclusion of the witness and incompetent, irrelevant and immaterial.

Defendant objects to question 54 and to the answer thereto:

Q. How much was Susie Mc worth to you, that is what would have been your portion of the earnings, basing your opinion on her past earnings for the remainder of the season?

A. At least two hundred dollars and more than that. She was very fast and easy to place in any race and could win most any race she was in and that would enable me to win a little money at pools, so her earning capacity was worth fifty dollars per week to me.

126 Defendant objects to the question for the reason that same is not the basis of proper damages, tends to vary the terms of a written contract, incompetent, irrelevant and immaterial; and to the answer thereto for the reason that the same is not responsive, is a conclusion of the witness, based upon what he thinks, and is not the best evidence.

Defendant objects to question 56 and to the answer thereto:

Q. What would be the reasonable market value of Susie Me if she were lame and unable to race?

A. About three hundred dollars.

Defendant objects to the question for the reason that the same tends to vary the terms of a written contract, the witness having already answered that he did not know what the horse was worth.

Wherefore, defendant prays that the questions and answers above mentioned be excluded from the jury for the reasons heretofore given.

COTTINGHAM & BLEDSOE,
CHAS. B. WILSON, AND
GEO. M. GREEN,

Attorneys for Defendant.

Endorsements on back of objections to depositions: No. 2807. Ent. In the District Court of Lincoln County, Oklahoma, No. —, H. F. Moore, C. E. Robinson and S. H. Smith, Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Company, Defendants. Objections to Depositions. Filed Dec. 17, 1909. D. J. Norton, Clerk District Court, Lincoln County, Okla.

127 Whereupon the 4th day of April 1910, said cause was set for trial April 18, 1910, which Order of the Court is in words and figures as following, to-wit:

128 Be it remembered that on this 4th day of April 1910, the District Court of Lincoln County, State of Oklahoma, convened in regular session in the District Court Room at Chandler, in said County and State, pursuant to law. Present and presiding the Honorable Roy Hoffman, District Judge; also present, D. J. Norton, Clerk, John J. Davis, County Attorney, L. E. Martin, Sheriff; and W. L. Ducker, Court Reporter; and public proclamation of the convening of said Court having been made, and said court having been opened in due form of law, the following proceeding were had, to-wit:

No. 2807.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Ordered by the Court that said cause be set for trial April 18, 1910.

Whereupon the 18th day of April 1910, the defendant
129 filed its Motion for a Judgment on the Pleadings, which
Motion is in words and figures as follows, to-wit:

130 District Court Lincoln County.

No. 2807.

H. F. MOORE et al., Plaintiffs,
vs.
A., T. & S. F. Ry. Co., Defendant.

Comes now the defendant and moves the court to render judgment on the Pleadings in favor of the defendant and against the Plaintiff, for the reason that the pleadings show on their face that Judgment should be rendered the defendant.

EMERY A. FOSTER,
GEO. M. GREEN,
Attorneys for Defendant.

Endorsement on back of Motion of Judgment on Pleadings: No. 2807. Ent. H. F. Moore, et al., vs. A., T. & S. F. Motion for Judgment on Pleadings. Filed Apr. 18, 1910. D. J. Norton, Clerk Dist. Ct., by I. E. Billingslea, Deputy.

Whereupon the 18th day of April 1910, said cause comes
131 on for hearing upon the Demurrer of the Defendant to
Plaintiffs' Reply to the defendant's Answer and Amendment
thereto, and upon the defendant's Motion for Judgment on Pleadings, which ruling of the Court is in words and figures as follows,
to-wit:

132 In the District Court of Lincoln County State of Oklahoma

No. 2807.

H. F. MOORE et al., Plaintiff-,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Journal Entry.

Now, to-wit, on this 18th day of April 1910, same being one of the regular *judicial* days of the regular April 1910 term of this Court, this cause came on for hearing upon demurrer of the defendant to the reply of the plaintiff, the plaintiff appearing by H. H. Smith and Rittenhouse & Rittenhouse, his attorneys, and the defendant appearing by Cottingham & Bledsoe, Geo. M. Green, and Emery Foster, its Attorneys; and

Therefore, said demurrer was presented to the court and the court being fully advised in the premises overruled said demurrer as to the general denial contained in said reply and sustains said demurrer as to the new matters set forth in said reply to the sustaining of said demurrer the plaintiff at the time duly excepted and still excepts.

Thereupon and on the 18th day of April A. D., 1910, said cause came on for hearing upon the motion of the defendant for judgment upon the pleadings, the parties appearing as heretofore, and the court being fully advised in the premises overruled said motion, and to the overruling of which said motion the defendant at the time duly excepted and still excepts; and,

Thereupon and on the 18th day of April A. D., 1910, said cause having been duly and regularly assigned for trial and duly and regularly reached for trial, the parties appearing as heretofore; and

Thereupon, comes a jury of twelve good and lawful men, to-wit:

133 R. P. Martin, Raymond Day, Andy Gammill,
W. H. Godfrey, J. B. Edmonds, Chas. Stiller,
E. F. C. Lanton, M. E. Myers, B. H. Kessinger,
G. B. Guinn, J. M. Gardner, Sam Bickford,

who are duly empaneled and sworn to try out said cause; and

Thereupon, the plaintiff states his case to the jury and defendant states his case to the jury.

Thereupon the defendant objects to the introduction of any evidence in behalf of plaintiff for the reason that plaintiffs' petition, amended petition and reply do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant; which objection is duly considered by the court and overruled, to which ruling of the court, the defendant at the time duly excepted and still excepts, and

Thereupon the plaintiff proceeds with the introduction of his testimony and concludes the same and rests his case; and

Thereupon the defendant files its demurrer to the evidence of the plaintiff upon the grounds and for the reasons that the evidence introduced by the plaintiff herein is not sufficient and does not prove or tends to prove a cause of action in favor of the plaintiff and against the defendant, and for the further reason that there is a variance between the pleading and proof, which demurrer is by the court considered and overruled.

Thereupon the defendant proceeds with the introduction of its evidence and concludes the same and rests its case; and the plaintiff introduces evidence in rebuttal and rests his case; and

Thereupon the defendant moves the court for peremptory instructions to find for the defendant and the court being fully advised in the premises overrules said motion, to which ruling of the court, the defendant at the time duly excepted and still excepts; and.

Thereupon the court instructs the jury in writing as to the law of the case and the case is argued to the jury by counsel for plaintiff and defendant; and

134 Thereupon the jury retire in charge of a sworn officer of the court to deliberate of their verdict; and

Thereupon and thereafter the jury return into open court with their verdict, which is in words and figures as follows, to-wit: "We, the jury duly empaneled and sworn to try the above cause do, upon our oaths find for the plaintiffs and assess the amount of their recovery at Fourteen Hundred Dollars (\$1,400.00)"

Which verdict is received and filed.

Thereupon the jury are discharged from further consideration of this case.

Thereafter on the — day of — A. D. 1910, said cause came on for hearing upon the motion of the defendant for a new trial herein, the parties appearing as heretofore and the Court after argument of counsel for plaintiff and defendant, and being fully advised in the premises, overrules said motion for new trial to which ruling of the court, the defendant at the time duly excepted and still excepts; and

It is therefore considered, ordered and adjudged by the court that the plaintiff F. H. Moore, C. E. Robinson and S. H. Smith do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, the sum of Fourteen Hundred and No/100 (\$1,400.00) Dollars with interest at the rate of six per cent per annum from the 19th day of April A. D. 1910, and costs of this suit.

Thereupon said defendant makes application to the Court for extension of time within which to make and serve a case made in said cause for review by the Supreme Court of the State of Oklahoma, and the court upon due consideration of said application and for good cause shown grants said application, the said defendant being

135 granted sixty days within which to make and serve a case made for review by the Supreme Court of the State of Oklahoma, the plaintiff being granted ten days in which to suggest amendments thereto, said case made to be signed and settled on five days' notice by either party to the other;

It is further ordered by the court that execution herein be stayed upon the giving of a good and sufficient bond by the defendant in the sum of Twenty-six Hundred (\$2,600.00) Dollars to be approved by the Clerk of this Court, which bond is to be given within thirty days, execution to be stayed pending appeal of this cause to the Supreme Court of the State of Oklahoma.

JOHN J. CARNEY, *Judge.*

O. K.

H. H. SMITH,

R. & R.,

Attorneys for Plaintiff.

GEO. M. GREEN,

Attorney for Defendant.

Dated this — day of April, A. D. 1910.

136 STATE OF OKLAHOMA,
Lincoln County, ss:

In the District Court of Lincoln County, Oklahoma.

No. 2807.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a
Corporation, Defendants.

Now on this 18th day of April, 1910, the above entitled action being duly called for trial, Hon. John J. Carney, Presiding the plaintiffs being present by C. E. Robinson in person and by attorneys Rittenhouse and Rittenhouse and H. H. Smith; the defendant appearing by counsel Geo. M. Green and Emery A. Foster, thereupon the following proceedings were had and the following evidence was introduced, same being all the evidence introduced by both parties at the trial.

Thereupon H. H. Smith, Attorney, makes statement to the jury for the plaintiffs which statement is in words and figures as follows:

"Court, and Gentlemen of the Jury: This is an action for damage for the purpose of recovering for injuries which are alleged to have occurred on or about the 18th day—somewhere between the 17th of September 1907 and the 20th of September, 1907, on the Atchison, Topeka and Santa Fe Railway Company, between the yards in Kansas City, Missouri, and Lawrence, Kansas, a distance of about fifty miles.

The contention of the plaintiffs in this case is that this mare Sousa Mc, and the evidence will show to the jury, that she was a black, three year old mare, medium size, and had trotted miles of races around 2:18 and 2:19 and that at the time of her entry and prior during that season she had finished second in every race she had started in, and was at the Kansas City mile track, being shipped

137 from Kansas City to Lawrence, Kansas to be raced there in races on about the 20th of September, 1907. And with three other horses she had been loaded in a car at the freight depot in Kansas City, Missouri, and loaded in this car for the purpose of shipping her to Lawrence, Kansas, to race there in these races.

And the evidence will show you that Mr. H. F. Moore and Mr. Robinson who is here and who are both trainers had leased that mare from S. H. Smith, who the evidence will show is the Chief of the Government Special Agents for the Interstate Commerce Commission at Washington—had leased her to these young men to race throughout the season for what they could make out of her.

The evidence will show you that in the case—that this mare was a pacing mare and two other race horses were left in the car about five or six o'clock the evening of the 17th in the yard at Kansas City for the purpose of shipping them to the races at Lawrence, Kansas.

The evidence will show you that the arrangement was made to ship these horses in freight other than a local freight so that they would not get tied up and would land there quicker and in good shape for the races.

The evidence will further show you while they were loaded about five or six o'clock they remained in the yards in and around Kansas City, Missouri, and in and around the yards at Argentine, which is across the river, about all night, until sometime in the morning of the next day and during this time they were constantly bumped around by switching cars all the night long and the result of that bumping around was to knock them down and strain the ligaments and tendons of this mare's leg in the left leg just below the knee, the suspensory ligaments, and the testimony will develop they were what is called pulled out and by reason of that injury she was unable to race after that time.

The evidence will show you that they picked these horses up during the morning of the 18th by a local freight and carried 138 them on to Lawrence, Kansas, and they arrived there about noon of that day. And when they got there they were unloaded by two of the plaintiffs in this action and taken to a livery barn up town and kept there and treated and attempted to be prepared for the race and that this mare particularly in controversy here was started in a first race for \$350.00 the next day or two after that and that she refused and failed to perform in that race and finally broke down and was distanced—that is what race men call broke down—she stopped and refused to perform in the race.

That after that time she was shipped to Oklahoma City and treated and undertaken to be prepared to be kept up for the balance of her later engagements which the evidence will show was at Fort Worth and Dallas and Oklahoma City, but was wholly unable to perform and has since been valueless.

The testimony will show this was due to the negligent handling of this mare by the defendants.

The evidence will show that the plaintiffs, two of them, were with these horses taking such care of them as was in their power and this mare was with the four horses and she had no other opportunity

to be injured in any other way and that she was sound when loaded and had been sound and raced consistently and successfully before this time, and that as a three year old trotter at the time this injury she was one of the very fastest in the West.

That she had been broken that spring and had not been trained as a three year old and up to this injury her training was rather limited and her future was regarded by trainers as away above the average.

And the contention of the plaintiffs is that after this injury she was worth but very little money except for breeding purposes and not valuable at all for racing purposes.

139 We think, if we can establish that fact, the court will instruct you that the plaintiff is entitled to recover the difference between the value of this mare before she was injured and the value of the mare after she was injured, and with that statement we rest our case, for the evidence.

Thereupon Mr. Geo. Green made statement to the jury in behalf of the defendant, which statement was in words and figures following:

"May it please the Court, and gentlemen of the jury: You understand of course the statements that Mr. Smith and I make to you here is no part of the evidence and when you come to consider your case, you do not take them into consideration. It's merely an outline of what each of us expects the evidence to show. So that as a preliminary step what I may say or what Mr. Smith may say is not to be regarded by you after you have heard the evidence.

Now, what the railroad Company in this case expects to show, we admit we secured, that this horse was delivered to us about the 16th of September, 1907, somewhere after the hour of six o'clock; that it was loaded into one of the cars of the railroad Company to be transported to Lawrence, Kansas; that when the shipment was delivered the contract of shipment was entered into between the shipper and the railroad company which we expect the court will tell you was the contract of shipment in this case.

That at the time there was nothing said about any racing horses or races; it was merely to ship horses to Lawrence, Kansas, and the horses were taken over to Kansas City on a freight train next morning and delivered at Lawrence, Kansas.

140 They were taken from the railroad Company about noon or a little after—no complaint made—nothing said about any injury sustained; and there never has, up to this good day, been any notice or opportunity given to examine those horses and ascertain whether they were injured. We have never had an opportunity to inspect them. One of the provisions of the live stock contract provides that before the stock are removed or intermingled, they shall serve a notice on the railroad company and give us an opportunity to determine the amount of the injury, and we expect the court to instruct you their failure to comply with that portion of the contract would defeat their right to recover.

It is only fair to the railroad company that they shall have an opportunity to see for themselves to determine the extent of the damage, if any, they do sustain.

This mare was put in the races I think, the next day; won second money I think in two of the heats, or came out second place in two of the heats, but in the third heat came out towards the last.

Now, as to what this horse could earn, we know nothing about it, and we expect the court to instruct you *with* will not enter into the consideration of this case.

The railroad company contends the provisions of the contract has not been complied with, and we expect that the court will instruct you in that regard, by which you will be bound fully.

I thank you."

141 Mr. GREEN: At this time the defendant objects to the introduction of any testimony upon the ground—for the reason that the plaintiffs' petition and reply taken in connection with the answer fails to state a cause of action in favor of the plaintiffs and against the defendant, and for the further reason that the defendant is entitled to a judgment on the pleadings.

Which objections are both by the court overruled and exceptions taken by the defendant.

Thereupon the following testimony was introduced in behalf of the plaintiffs.

Mr. SMITH: The plaintiff now offers in evidence the deposition of H. F. Moore, one of the plaintiffs in the above action, taken pursuant to notice attached to the deposition at Armour, South Dakota, at the office of John P. Hand, in the County of Douglas on the 24th day of August, 1908 to be read in evidence in this action in behalf of the plaintiff.

Mr. Smith reads as follows:

"Depositions of witnesses taken to be used in a action pending in the District Court *wherein* and for the County of Lincoln in the State of Oklahoma, wherein S. H. Smith, H. F. Moore and C. E. Robinson are plaintiffs and the Atchison, Topeka and Santa Fe Railway Co. is defendant in pursuance of the notice hereto attached and at the time and place therein stated. The said S. H. Smith, H. F. Moore and C. E. Robinson plaintiffs, appeared by their attorney and thereupon the said plaintiffs produced the following witnesses, *to-wit*:

H. F. MOORE, of lawful age being first duly sworn, deposes and saith:

Q. State your age, occupation and residence during the year 1907, about the month of September.

A. Age 21 yrs. lived at Armour S. D., was racing and training horses.

Q. Are you one of the plaintiffs in this action?

A. I am.

Q. State what interest you had in the mare Susie Mc alleged to have been injured by defendant.

A. Was racing her for half of the winnings.

Q. What interest did C. E. Robinson have and what interest did Mr. S. H. Smith have in her if you know.

A. Mr. Smith put up most of the money to buy the mare

and I do not know what arrangements were between Mr. Smith and Mr. Robinson.

Q. State who trained the mare.

A. I trained the mare.

Q. State what time you began training her.

A. I began training her about March 1st 1907.

Q. State whether or not she was a green mare or had been trained before that time?

A. The mare was a green mare because when I took her she was not gaited and didn't have very much trotting speed.

Q. How long did you train her?

A. I trained her from about the first of March until I turned her over to Robinson at Lawrence, Kan., September 23, 1907.

Q. State the places where you raced this mare during the season of 1907?

A. At Courtney, N. D.; Fessenden, N. D., Harvey, N. D.; Clay Center, Kans., Topeka, Kans.—Lawrence, Kans.

Q. Where did she finish and how much money did you get out of the race at Courtney, N. D.?

A. Finished 2nd—got \$75.00.

Q. State if you know — the age of this mare was.

A. She sold for a 3 year old and we broke and raced her for a three year old.

Q. What kind of a race was it you started in and what kind of horses was it you started against at Courtney, N. D.

Objected to by defendant as immaterial.

Overruled. Exception taken.

A. Started her in the 2:35 trot against aged horses.

143 Q. How fast if you know did the mare trot in this race?

A. She trotted in 2:28.

Q. Where did you next start her?

A. At Fessenden, N. D.

Q. Did she win anything and what kind of horses did she start against?

Objected to by defendant as above.

Overruled. Exceptions taken.

A. She won first money and she started against aged horses. She won \$150.00.

Q. Where did you start her again?

A. At Harvey, N. D., same week and she finished third or fourth.

Q. What was the amount of the purse you were racing for and what would be second or third money?

Objected to by defendant as above.

Overruled. Exceptions taken.

A. We were racing for \$300.00, Second money would be \$75.00, third money \$45.00.

Q. Did you say you won second or third money in the race?

A. Yes.

Q. Where did you start her next?

A. At Clay Center, Kansas.

Q. A State what you won there and the kind of a race she was in.

Objected — by defendant as above.

Overruled. Exception taken.

A. Won third money, was in a three year old trot—money was \$75.00.

Q. Where did you next start her?

A. Topeka, Kans.

Q. State what kind of a race she was in and what money she won?

Objected to by Defendant as above.

Overruled. Exception taken.

144 A. She was in the three year old trot and won second money which was \$250.00.

Q. What did you do with her then?

A. Shipped her to Kansas City.

Q. What did you do with her there?

Q. What did you do with her there?

A. Laid her up there expecting to race her at Lawrence the next week.

Q. Did you race her at this place?

A. I did—then turned her over to C. E. Robinson.

Q. Where did she finish at Lawrence in that race?

A. She was distanced and sent to the barn.

Q. Was the race in which she was distanced a faster or slower race than she had been trotting previously?

A. The race was eight or nine seconds slower than the ones she had been trotting in previous to this time.

Q. Did you see the time announced in this race?

A. I heard the time announced as in the previous races by the judges.

Q. It is stated in the petition of this case that she was injured at Kansas City or rather in the yards about Kansas City—between Kansas City and Lawrence, Kansas, state if you know how this injury occurred?

A. I was with her when she was loaded at Kansas City and when she was injured.

Q. State exactly how the injury occurred if you know.

A. Well, C. E. Robinson and myself went up to the freight office at Kansas City and informed the chief clerk in the freight office that we wanted to ship four horses to Lawrence, Kansas, in time for the races which as I recollect commenced on or about the twenty first of September. I told him I wanted to ship them on a fast freight, that is a freight called the Red Ball, and if we could not ship out on that freight we would ship them over some other road. He said for

145 us to load them about four o'clock P. M., but my recollection is that it was about six o'clock P. M. when we got them loaded as that was as early as they required. We put two horses in each end of the car and cross tied them with ropes and Susie Mc and Nancy Allen were in the end of the car together. They informed

us that the freight would leave at ten o'clock and arrive at Lawrence about 12 o'clock that night. C. E. Robinson and I stayed in the car with them. They kept the car in the yards or somewhere about Kansas City most of the night and were knocking our car about most of the time. Sometimes there would be a half hour when the car would be still.

Q. Did you make any protest to the persons in charge of the train?

A. Yes I think we swore at about every man that passed around the car and there was one fellow who appeared to be a switchman. Do not know his name. (Balance of answer stricken out).

Q. In the freight office of what Company do you refer to above?

A. The office of the Atchison, Topeka and Santa Fe R. R.

Q. How hard did they strike the car in which the horses were?

A. Well they hit the car at least twenty times hard enough to knock the horses down on their knees several times.

Q. What time did you get to Lawrence, Kansas?

A. About 12 o'clock next day.

Q. What kind of a freight were you hauled on?

A. A local freight.

Q. What did you do when you got to Lawrence?

A. Went up to pay the freight. C. E. Robinson and I both went up to see the chief Clerk and told him we wanted to pay the freight.

Q. Did he tell you what it was and did you pay it. If not, state what the conversation was.

A. (First part of answer stricken out.) He did not know just what the freight was but we could pay about what it was and he would collect the balance if any when freight bill was returned. I don't recollect what the freight was—about \$20.00 we paid him and then paid about \$2.60 when he got bill a couple of days later.

Q. State whether or not was Sousie Me sound before you loaded her at Kansas City?

A. She was absolutely sound—might have had a wind puff or something that did not bother her but she was practically sound.

Q. Do you know when she was injured and how—if so you may state.

A. Yes sir I do. It was during the night sometime while they were knocking her around during the night in the yards. She was knocked down several times and was bracing herself to prevent falling when the cars would bump with us. This would naturally strain her legs and muscles, which it did. I noticed her leg about daylight when we were in Argentine. It had begun to swell and when we arrived in Lawrence it was considerably swollen. It was her left front leg and was swollen from her knee down towards her fetlock. Her back tendon and the suspensory ligaments of her left leg were strained and inflamed—had a great deal of fever in them.

Q. What did you do after you got to Lawrence with her leg?

A. I soaked it in cold water and tried to keep the fever out and put on some strong absorbent liniment and tried to get her to race at Lawrence but she was so lame she could not trot much.

Q. How long were you at Lawrence after the race you speak of?

A. Three days.

Q. How did her leg get along and how was she as to lameness?

A. She was quite lame and I made up my mind she was knocked out and I turned her over to C. E. Robinson and went back to Dakota.

Q. How much experience have you had with trotting horses?

A. Have had general experience all my life. I have had practical experience with trotting horses for four years principally with Running Mead Stock Farm, Armour, S. D.

147 Q. State what your experience with them was relative to training, buying and selling horses.

A. I had charge of most all the horses. They have a large number of horses in training—from 20—30 generally, and sold about that many every fall and bought about that many every year—I always assisted in buying and selling—and took the horses to auction sale at Indianapolis, Chicago, and the east and managed and superintended the selling of them for the farm.

Q. From your experience what is a reasonable value of trotting horses in general of her kind, after you had examined them, informed as to their breeding and seen their work at pace or trot?

A. I can say close to what their market value is—or what they would bring in the market.

Q. Do you know how fast Sousa Mc could trot?

A. Three miles on a mile track. I think she could trot. She could trot three times around in 2:15 or 2:16 in good condition.

Q. Did you ever see her trot that fast?

A. I think I never trained her that fast but think I saw her trot and timed her three miles about 2:20 on a half mile track at Clay Center Kansas and at Topeka Kansas. It is my opinion that the performance was as good as three heats in 2:16 on a mile track.

Q. When you say her trotting three heats around 2:20 and you timed her three heats around 2:20, was she trotting as fast as she could trot?

A. I think not.

Q. State the reason why she was not trotting as fast as she could?

A. We expected to race her as a four year old and did not want to get her marked very fast so that we took second money or as near that as we could get.

Q. What in your opinion was a reasonable value in the market, of Susie Mc at the time she was injured or about Sept. 20th 1907.

148 Defendant objects to the incompetency of the witness, and tending to change the terms of a written contract.

Overruled.

Exception taken.

A. I think she was worth—would have brought at public auction \$2,000.00 and I know considering her poor condition, poor opportunity that she was worth a great deal more money.

Q. Have you seen her at any time since you left Lawrence, Kansas?

A. No sir I have not.

Q. Did you pay out any money on her after she was injured at Kansas City?

A. I paid out some money on her, don't know how much, and Mr. Smith promised to pay the fees against her in the races in which she was injured.

Q. Do you know what they amounted to.

A. Making a guess of it, for the five races she was in about \$100.00.

Moved by defendant that answer be stricken out.

Sustained.

Q. How much was Susie Mae worth to you, that is what would have been your portion of her earnings, basing your opinion on the past earnings for the remainder of the season?

Objected to by defendant as incompetent, irrelevant, immaterial not the proper measure of damage, tending to change terms of written contract.

Overruled.

Exception taken.

A. At least \$200.00 and more than that. She was a very fast mare and easy to place in any race and could run and that would enable me to win a little money out of pools so her earning capacity was worth \$50.00 per week to me.

Q. Do you know what Sousa Mae is worth at this time?

A. I do not.

Q. What would be the reasonable market value for Sousa 149 Me if she were lame and unable to race?

A. About \$300.00.

Q. In what did her value consist chiefly before her alleged injury?

A. In her ability to win money as a race horse.

(Signed)

H. F. MOORE."

Mr. GREEN: This is the cross examination of H. F. Moore.

Mr. Green reads:

"Q. You are the H. F. Moore who gave the direct testimony in this case on the 17th day of August 1908?

A. Yes sir.

Q. How old are you Mr. Moore?

A. I am going on 23.

Q. How long have you known Mr. S. H. Smith, plaintiff in this case?

A. I have known him about eight years.

Q. How long have you known Mr. C. E. Robinson, the other plaintiff?

A. About three years.

Q. What interest if any did C. E. Robinson have in Susie Mae?

A. I do not know what interest Mr. Robinson had in Susie Mae?

Q. Do you know where Susie Mae was raised?

A. No sir, I do not.

Q. Where did you first know her?

A. When she was shipped from Kentucky about the first of March, 1907.

Q. How old was she then?

A. I would judge from her appearance that she was a three year old.

Q. Where was she next shipped?

A. We shipped her from here to Courtney, No. Dak.

Q. When was that?

A. That was in the first part of June, 1907.

Q. Did you accompany her?

150 A. I did.

Q. What other horses if any did you have in your charge?

A. I had two other horses in my charge, John Drue and Dox Ex Tallion.

Q. Was Mr. Robinson with you at that time and with his horse?

A. He was.

Q. From Courtney where did you then ship?

A. We shipped to Carrington, No. Dak.

Q. Did Mr. Robinson ship with you?

A. Yes sir.

Q. Were your horses all in the same car?

A. Yes sir.

Q. Where did you next ship?

A. We shipped to New Rockford, No. Dak.

Q. Then where did you next ship?

A. We shipped to Valley City, No. Dak.

Q. Now just state from what places you shipped from Valley City until you arrived at Kansas City?

A. I shipped from Valley City to Kensal, from Kensal to Fessenden, from Fessenden to Harve, from Harve to Armour, So. Dak., from Armour to Manhattan, Kans.; that is I shipped this black mare to Manhattan.

Q. Was Mr. Robinson with you from the time you left Armour until you returned to Armour?

A. He was with me, yes sir.

Q. He was not with you when you shipped to Manhattan?

A. No sir.

Q. Where did you ship from Manhattan?

A. To Clay Center, Kan.

Q. Where did you ship from Clay Center?

A. To Topeka, Kan.

Q. What horses did you have with you?

A. I had Susie Mac.

Q. Then you shipped from Topeka to Kansas City?

151 A. I did.

Q. Then Mr. Robinson joined you there?

A. Yes sir.

Q. What horses did he have?

A. He had Nancy Allen, John Drue, Dox Ex Tallion, and Cheerful Mary.

Q. How many horses did you and Mr. Robinson ship from Kansas City to Lawrence?

A. Four.

Q. Which one of the horses did you leave behind at Kansas City?

A. We left Cheerful Mary at Kansas City.

Q. When did you arrive in Kansas City with your horses?

A. On the 14th of Sept. 1907.

Q. When did Mr. Robinson join you there?

A. Mr. Robinson was there when I arrived.

Q. What day did you ship from Kansas City to Lawrence?

A. It was on Monday, I think Sept. 16th 1907.

Q. What time did you call at the freight office of the R. R. Co. and who was with you?

Mr. GOHEEN: Objects the question that the proper foundation isn't laid for the question.

A. Went to the freight office about noon, and Mr. Robinson was with me.

Q. Who did you talk with at the depot?

A. Mr. Robinson did the talking.

Q. What did Mr. Robinson say?

A. I couldn't say positively. He ordered a car and they told him to be ready to load at 4 o'clock.

Q. With whom did Mr. Robinson talk?

A. I do not know.

Q. Can you describe the appearance of the man?

A. No sir.

Q. Did you take any part in the conversation?

152 A. No sir.

Q. Did you secure a B/L or contract?

A. I do not know.

Q. In whose name were the horses shipped?

A. In my name.

Q. Why did you ship in your name, were you in charge?

A. I was not in charge but we just shipped in my name as I was with them.

Q. That is the shipments you had made with these horses when Mr. Robinson was with you were always made in your name?

A. They were.

Q. Did you secure any ticket or transportation for the horses or for yourselves?

A. We never secured any transportation for ourselves.

Q. Did you have a contract?

A. I did not, but presume Mr. Robinson had one.

Q. What time of the day did you load the horses?

A. We loaded them about 6 o'clock, or half past on Sept. 16th 1907.

Q. You say that you did not secure a bill of lading or shipping contract for these horses?

A. I did not.

Mr. SMITH: Comes now the plaintiff in the above entitled action and objects to the introduction of any and all of the deposition of H. F. Moore, the questions and answers, with reference to the con-

tract, in this case with reference to the transportation of Sousa Mc and other horses as incompetent, irrelevant, immaterial and for the reason the contract is not such a contract as can be sustained in law and that the same is not a contract as is contemplated by the Interstate Commerce Law known as the Hepburn Act and is in violation of the same; and for the further reason it is not

153 alleged that the value contained in the limitation as expressed in the contract was represented by the plaintiffs or their agents, relied upon by the defendant, and that any rate so fixed operated as a consideration to support the limitation expressed in that contract. And for the further reason that the contract is alleged by the defendant in their answer to have been made and executed in Missouri and under the laws of that State the same is void and illegal.

Overruled.

Exception taken.

Q. I ask you to examine the paper which I herewith hand you, which is marked by the stenographer exhibit A, and state whether you have seen it before.

A. I have never seen it before that I can remember of.

Q. Can you state whose signature that is?

A. That is my signature made by Mr. Robinson.

Q. That is your signature, and Mr. Robinson was authorized by you to sign it?

A. Yes sir.

Q. Did you have this contract?

A. I presume Mr. Robinson had it.

Q. Do you know Mr. L. E. DeBois?

A. No sir.

Q. What time did you get out of Kansas City for Lawrence, Kansas?

A. We got out of Argentine, Kansas City Stock Yards, I should say about 6 o'clock in the morning.

Q. And arrived in Lawrence next day?

A. Yes sir.

Q. These horses were placed in the car about 6 o'clock at Kansas City?

A. Yes sir.

Q. And taken to Argentine, you got out of there about 6 o'clock in the morning?

A. Yes sir.

154 Q. What time of the day did you move from the dark track to Argentine?

A. About 10 o'clock or may be a little before.

Q. Where were the horses knocked down as you testify by direct examination?

A. In the Argentine Yards.

Q. Was Mr. Robinson with you there?

A. Yes sir.

Q. You discovered the horses were injured before you left Argentine?

A. I discovered this filly that I took particular interest in was injured.

Q. When did you discover that Nancy Olden was injured?

A. During the night sometime while we were in the yards at Argentine.

Q. She showed injury in both her front legs?

A. She did.

Q. You knew that both Susie Mae and Nancy Olden had been injured before you arrived in Lawrence?

A. Yes sir.

Q. Now, after you arrived in Lawrence what did you and Mr. Robinson first do?

A. We both went to the station, Robbie and I both, and asked the agent to tell us how much the freight was on the horses.

Q. Did you pay the freight then?

A. We did not pay all of the freight, we paid part of it (balance of answer stricken out).

Q. Was that all you talked to the agent about, the freight?

A. I do not know.

Q. You just talked about the freight, that was all?

A. Yes sir.

Q. Did you give a receipt, or did the railroad company give you a receipt?

A. I do not know.

Q. I herewith hand you a paper marked Exhibit "B" by the Notary for identification and ask you whose name is attached.

A. It is my name made by H. H. Smith I presume, I did not sign it.

Q. Who is H. H. Smith?

A. Why Mr. Smith was Vice President of the First National Bank of Armour.

Q. He was interested in the horses?

A. Only that he loaned money on them.

Q. Mr. Smith had money loaned on these horses?

A. That is the way I understand.

Q. Had you authorized Mr. Smith to pay the freight and receive them railroad company for these horses?

A. No sir.

Q. Why did he act for you then?

A. He was there, and when the agent presented his bill I did not happen to be around, and he paid it and signed my name to the expense bill.

Q. Are you acquainted with S. H. Smith, one of the defendants in this case?

A. Yes sir.

Q. He was interested in the horses also?

A. Yes sir.

Q. Both Susie Mae and Nancy Olden?

A. He was interested in Susie Mac I know, and he and Mr. Robinson had some deal with Nancy Olden, that I don't know.

Q. What day did you first attempt to race the horses at Lawrence?

A. We got there on Tuesday and I can't say positively whether it was Wednesday or Thursday that we raced the horses.

Q. How long had the Fair Association been open when you arrived at Lawrence?

A. I think it opened the day we arrived if I am not mistaken.

A. Did you ever serve any written notice upon the railroad company that Susie Mac had received any injuries while being transported from Kansas City to Lawrence, Kansas?

156 A. No sir.

Q. Have you seen either of these horses since you left them at Lawrence, Kansas?

A. No sir.

Q. Mr. Moore, what business or occupation did you occupy before you came to Armour?

A. I worked for the Southern R. R. Co. at Washington.

Q. What position did you occupy?

A. Ticket disbursing clerk.

Q. Well what else have you done?

A. I have trained and raced horses ever since.

Q. Did you work for the Frisco at Muskogee at one time?

A. Yes sir.

Q. What position did you occupy with them?

A. I was billing clerk for about three months with them.

Q. While you and Mr. Robinson were shipping these horses did you or he usually look after the shipping arrangements?

A. Either one or both of us.

Q. They were usually shipped in your name?

A. Yes, sir, when I was with them.

Q. When Mr. Robinson arranged for the shipping of these horses in your name, that was satisfactory to you?

A. Yes sir.

Q. Did you take part in any of the conversation with the clerk at Kansas City when these horses were shipped?

A. I went up after they were loaded and asked when we were going to get out.

Q. Did you have the horses at the freight office when you made arrangements to ship to Lawrence?

A. No sir, we made arrangements for the car before we brought the horses down.

157 Q. You didn't show the horses to the clerk or agent at Kansas City?

A. No sir.

Q. Did you or did Mr. Robinson talk with more than one party at the depot at Kansas City when you arranged for the shipping of the horses at Kansas City?

A. I do not know.

Q. You were with him all the time were you?

A. Most of the time, but I was in the car part of the time while he was up there.

Q. When you shipped horses did you usually secure a bill of lading or a shipping contract?

A. We usually secured a shipping contract as a general rule.

MR. SMITH: Now comes the plaintiff in this action and moves to strike out all of the evidence of the witness H. F. Moore adduced on cross examination for the reasons offered in the objection heretofore made.

Overruled. Exception taken.

Redirect examination by MR. GOHEEN read by MR. GREEN:

Q. Mr. Moore were you present when the car was ordered from the railroad company at Kansas City?

A. I remember being with Mr. Robinson, but I do not know whether I was present when he ordered the car or not.

Q. I believe that you testified that the railroad company said that the car would be ready at 4 o'clock.

A. Yes sir.

Q. What time did you load?

A. At 6 o'clock.

Q. What time did you get out of Kansas City?

A. About 6 o'clock in the morning, I think about daylight
158 Q. How did it happen that you did not get out of Kansas

City before 6 o'clock?

A. This Red-ball freight which was to carry us went off and left us.

Q. Did the Co. promise to get you out on the Red-ball freight?

To which the defendant objects for the reason it is incompetent irrelevant and immaterial.

Overruled. Exception taken.

A. Yes sir.

Q. I believe Mr. Moore that you testified that you had more or less experience training horses?

A. Yes sir.

Q. You are able to judge from your experience the condition of a horse, its age, etc.?

A. Yes sir.

Q. I will ask you now Mr. Moore the condition these horses were in when they were loaded at Kansas City.

To which the defendant objects as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. They were sound.

Q. Did you authorize any one to serve notice of injury on the railroad company?

A. No sir.

Q. Did you know that notice of injury had been served on the railroad Co.?

To which the defendant objects for the reason that it assumes a fact not in evidence.

Overruled. Exception taken.

A. Yes sir, I knew that a notice had been served.

Q. You testified that you always took a Bill of lading when the horses were loaded?

A. We took a contract.

159 Q. Did you, or do you know the conditions of the contract?

To which the defendant objects — incompetent, irrelevant and immaterial. I presume he did know.

Overruled. Exception taken.

A. Certainly I know, I never read the dam- thing, but I know what it means.

Recross-examination by GEO. M. GREEN:

— You testified that you knew that notice had been served on the Railroad Co. of the injuries to the horses shipped. Where, and how did you receive this information?

A. I received the information in Stanley Co., S. D., by a letter from Mr. H. H. Smith.

Q. When was that?

A. It was in 1908 sometime last spring I can't remember the exact date.

Q. This is the first information you had that notice had been served on the Railroad Co. that the horses had been injured.

A. Why Mr. Smith was here in the fall later on and we were talking about it, this is the first information I have received.

At this time defendant moves to strike out testimony of witness in relation to service for the reason it is now developed from testimony it's only hearsay information, not of his own personal knowledge.

Sustained. Plaintiff excepts.

Q. Did you at any time ever ask the agent at Lawrence, Kansas, to examine the horses as to their injuries.

A. No sir.

Q. You say that you are familiar and were familiar with the bill of lading and contract of shipment?

A. Yes sir, I know what it looks like, and know what it is therefore.

Q. Are you familiar with the shipment of goods over railroads, and did you know that they had two rates of freight, one at 160 a released value, and one at a non-released value?

A. Why I do not remember exactly how it was, as it has been so long since I was in a railroad office.

Q. You know that the railroad had two rates of freight on the same commodity?

A. I did not know that they had two rates on all commodities.

Q. Did you know that they had two rates on horses?

A. I knew that they made us pay more for a stud.

Q. You knew that this shipment moved on a reduced rate of freight did you not?

A. I can't say that I did, because I didn't.

Q. Did you tell the clerk or agent that you wanted the reduced rate of freight?

A. No sir.

Q. What if anything did you say about the freight?

A. I didn't say anything that I remember.

Q. Did the agent say anything about the freight?

A. No sir, not that I remember.

Q. Did he say anything to Mr. Robinson?

A. No sir.

Q. Did Mr. Robinson say anything to him about the freight rate?

A. No sir, not that I remember.

Q. You know that there were certain conditions in the live stock contract that were to be performed by you, did you not?

A. Yes sir.

Mr. GREEN: At this time the defendant offers in evidence Exhibits A and B which have been identified by the Notary, and ask that they be attached to the deposition, and that said exhibits A and B be received in evidence.

To which offer plaintiff objects for the reason stated to 161 testimony of the defendant in the examination above, and also at this time move to strike the evidence developed in cross examination of the plaintiff Moore in reference to the contract and shipment of these horses under the contract for the same reason given in the objection above.

Overruled. Exception.

Redirect examination by THOMAS GOHEEN:

Q. I will ask you Mr. Moore have you read the contract introduced in evidence?

A. No, I have never read it over fully.

Q. Did you know at the time the contract was entered into the condition and stipulations of the contract?

A. I did not know all of the conditions, only about me riding with the horses.

Q. Are you familiar with the different tariffs of the Railroad Co. on stock?

A. No sir.

Q. Are you familiar with the different tariff rates on horses?

A. No sir.

Recross-examination by GEO. M. GREEN:

Q. You can read and had the opportunity to read this contract?

A. I can read, but never had the opportunity to read this contract.

Q. Mr. Robinson had this contract and would have let you read it if you had asked him would he not?

A. Yes sir, I presume he would.

Comes now the plaintiff and renews motion to strike evidence for the same reason as given above.

Overruled. Exception taken.

Redirect examination by MR. THOMAS GOHEEN:

Q. Did you say that you could fully understand the 162-178 conditions of the contract had you read it?

To which the defendant objects as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. Yes sir; I think I could understand it.

(Signed) HERBERT F. MOORE.

Live stock contract is attached to the deposition and is considered read in evidence, also the freight receipt.

To which offer plaintiff objects as incompetent, irrelevant and immaterial and for the further reason as above objects to the evidence of H. F. Moore in cross examination in reference to contract and receipt bill for the freight.

179 EXHIBIT "B."

Form 1875 Regular.

Freight Delivery Receipt. (Santa Fe.) —Lawrence, Kans.—

Sept. 18, 1907.

Via

Consignee H. F. Moore. Freight Bill No. 1892.

Received from the Atchison, Topeka & Santa Fe Railway Co.,

Way-bill.	Car.	From—	Original point shipment and consignor.
Date. Number and Initials.	Number.	Kans. City.	H. F. Moore.
series.			

9/17 111921 A. O. 29297

The following property:

	Weight.	Rate.	Advances.	Total.
4 Horses	20000	36	1760	
O. R. as per contract.		Of car		
Owner in charge				

Location	Transfers (if any)	Switching
Delivery	In good order of condition noted	190 Inspection
By		
Agent will require consignee H. F.		
Moore to date this receipt		Total charges 1760

180 **Mr. SMITH:** Deposition of S. H. Smith is now offered in evidence in behalf of the plaintiffs in this action which deposition was taken on the 6th day of November, 1909 before H. S. Milstead, a Notary Public in and for the District of Columbia at the office of the Interstate Commerce Commission, City of Washington, District of Columbia.

Mr. Smith reads:

"CITY OF WASHINGTON,
District of Columbia, ss:

Deposition of S. H. Smith, a witness, taken to be used in an action pending in the District Court within and for the County of Lincoln, in the State of Oklahoma, wherein S. H. Smith, C. E. Robison and H. F. Moore are Plaintiffs, and Atchison, Topeka & Santa Fe Railway Company, a corporation, is defendant.

In pursuance of the notice hereto attached and at the time and place therein stated, the said S. H. Smith, Plaintiff, appeared in behalf of himself and his co-plaintiffs, and the said Atchison, Topeka & Santa Fe Railway Co., Defendant, appeared by Britton & Gray, its attorneys; and thereupon the said plaintiffs produced the following witnesses to-wit:

S. H. SMITH, of lawful age, who, being first duly sworn, deposeth and sayeth, as follows:

Q. State your residence and occupation.

A. I live in Washington, D. C. and was special agent for the the Interstate Commerce Commission.

Q. What was your occupation and residence in 1906.

A. I live in Washington, D. C. and was special agent for the Interstate Commerce Commission.

Q. Did you own interest in Running Mead Stock Farm, Armour, S. D., in September, 1906.

A. I owned a controlling interest in the Running Mead Stock Farm for five years preceding its dissolution in 1907.

Q. Do you know any thing about the three-year-old mare Sous Me.

181 A. Yes sir. I owned her at the time of her injury by the defendant in September, 1907.

Q. You say that you owned her at this time. Please state whether C. E. Robinson or H. F. Moore owned an interest in her at this time.

A. Yes sir, I gave each of them one-half of her winnings in 1907, during the racing season; that is, they were to race her and to have all that she won, and I did not have any interest in her winnings, and did not put up any of her expenses.

Q. Do you know any thing about how she was injured?

A. I do not.

Q. Did you ever see the mare race or trot a mile?

A. I do not think I ever did see her trot a race, but I saw her work at Armour once in the year 1907.

Q. From whom did you buy the mare?

A. I bought her from the First National Bank of Armour, S. D.
Q. What did you pay for her?
A. I paid \$1800.00 for her.
Q. Are you acquainted with the market value of the mare
Sousa Mc in September, 1907?
A. Yes sir, I am.

Q. What experience have you had, if any, in breeding, training, buying and selling trotting horses.

A. As a boy I was familiar with the operations of my father's business as a breeder of trotting horses at Running Mead Stock Farm at Vine Grove, Kentucky. I grew up in the work of breeding and training trotting horses and cannot remember the time when I was not in touch with the work. I have continued my interest in the business as owner and breeder to the present time. My experience, as above described, covers a period of not less than 25 years of actual dealings in the business.

Q. Are you able to say from your experience what the value of a trotter with speed is, when you know whether they are
182 sound or not, when you know what their breeding is, and what their speed and racing stamina is?

A. Yes sir, I am.
Q. State what that value depends on if you know.
A. It depends upon soundness; upon conformation; upon bloodline, that is, the character of their breeding; the courage and stamina and staying qualities of the horse, and whether they are good headed or level headed, and consistant and good-mannered.

Q. What would the mare Sousa Mc be worth, basing your opinion upon your experience and your previous knowledge of her conformation, individual courage, and soundness, if she could trot three mile heats in 2:15 on a mile track, or in 2:20 on a half mile track, on or about September 20, 1907?

A. I would say fully \$5,000.00.
Q. Do you know whether she ever trotted a mile in 2:15 or not?
A. I do not, except by hearsay.

Q. Can you state whether or not there was any other facts upon which you base your estimate of her market value, that is not covered in the above question?

A. I think I have covered the grounds for the basis of my opinion of her value in my previous answer except that she had not been trained as a two-year-old.

Q. Was the fact that a three-year-old which had not been trained as a two-year-old, and could trot three heats in 2:15 on a mile track, and three heats in 2:20 on a half mile track, make any difference in the value of any three-year-old? If so, state what that difference would be, if you know?

A. It would make a great deal of difference. Any three-year-old that could trot three heats that fast with only one season's training would be worth a great deal more than a three-year-old which had been trained as a two-year-old, for the reason that she very likely

183 would improve much more after that than one which had been trained as a two year old. This would be the rule.

Q. Can you state whether Sousa Mc was trained as a two-year-old or not.

A. I can. She was not. She was broken and trained as a three-year-old.

Q. State whether or not you have seen the mare Sousa Mc since she was alleged to have been injured by the Atchison, Topeka & Santa Fe Railway Co.

A. Yes sir. I saw her in May, 1908, at Shawnee, Oklahoma.

Q. Have you had any experience in treating horses that have had injured legs?

A. Yes sir. I have treated them a great many times.

Q. State, if you know, what the treatment is of a horse that has ruptured ligaments and tendons.

A. Rest, and the application of blistering fluids to the injured parts and absorbent liniments. Sometimes they are fired with a red-hot iron.

Q. At the time you saw Sousa Mc in May, 1908, did she have any appearance of injury to you?

A. Yes, her left front leg was injured.

Q. State the extent of those injuries if you know what they were.

A. Well, she had a bruised tendon, that is, the main tendon of her left front leg was bruised and had a thickened appearance, and up under her knee the suspensory ligaments that are directly under the main tendon, appeared to be ruptured and enlarged under her knee, that is, they had the appearance of being pulled out of the knee, in fact, they were enlarged and loosened.

Q. What, in your opinion, basing your answer on your experience, is the cause of such an injury as she had?

A. The injury may be caused in different ways, but it is generally caused by a strain or a sudden wrenching of the ligaments.

Q. What is the cause of an enlarged or thickened back tendon, if you know?

A. It is generally caused in the same way and has the 184 appearance of what is known as a bowed tendon.

Q. Do these injuries ever happen shipping horses?

A. Yes sir, they very often happen that way, especially if the horse is on the car a long time, or is suddenly jerked and the jerking is constant for a long period of time.

Q. What do you consider the market value of Sousa Mc at this time in the condition she is in, and what would her value be based upon?

A. I would consider her worth \$300.00 or \$400.00. Her value would consist, in my opinion, on very slight hopes of her ever racing again and chiefly on her value for a brood mare or driving mare.

Q. Describe Sousa Mc.

A. She is a black mare, fifteen hands and one inch high, of close muscular conformation and what is known as a high finished mare, and well adapted for a race mare.

Q. State, if you know, what the earning value of a three-year-old

trotter is, that can trot three heats better than 2:20, or as good as 2:20 on a half mile track.

Defendant objects as incompetent, irrelevant and immaterial, not at issue in this case.

Overruled. Exception taken.

A. If she is entered in what we call stakes, her earning capacity would be about \$500.00 per week during the racing season if the purses amount to \$250.00.

Q. What do you call the racing season?

A. From June to November.

Q. Did you furnish Mr. Robinson or Mr. Moore, either one or both, any instructions as to how to race this mare?

A. Yes sir. I instructed them to keep her eligible to the 2:25, and not win with her at any time first money, unless she could be kept without a record faster than 2:24½, which record 185 would permit her to be raced next year in the 2:25 class.

Q. Is a horse with a slow record more valuable than one with a fast record? If so, state what the reason is for the difference in their market value.

A. A horse with a slow record is worth a great deal more generally, than one with a fast record, because they can compete for the prize money in slow classes, which generally means in slower time than in fast classes.

Q. What has become of the mare Sousa Mc at this time?

A. I still own her. She is at my brother's place in Shawnee, Oklahoma.

Q. In your opinion, will Sousa Mc be able to race any more, basing your opinion on the condition of her leg at the time you saw her in May.

A. I do not think she will.

Q. What do you base your opinion on?

A. That she is a flat footed trotter and strides very far and this class of trotters must have sound legs. I don't think her injuries can be cured and I don't think soreness could be kept out of her legs.

(Signed)

S. H. SMITH.

Mr. SMITH: Plaintiff now offers in evidence the deposition of O. B. Graves in behalf of the plaintiffs in this action taken at Kansas City on Friday, the 18th day of December, 1908, to be read as evidence in behalf of the plaintiffs in this action.

Omitting the caption Mr. Smith reads:

"Mr. O. B. GRAVES, of lawful age, being first duly sworn, deposeth and saith:

Direct examination by Mr. H. H. SMITH:

Q. What is your name, occupation and residence?

A. My name is O. B. Graves, live at 717 Penn at Kansas City. I trade and deal in horses, and train horses.

Q. How long have you been engaged in training and dealing in horses?

186 A. About twenty years, or a little more.

Q. What kind of horses have you been training and dealing in?

A. Harness, trotters and pacers.

Q. Where were you engaged before you came to Kansas City?

A. That mean- just recently before I came here or all the time in a general way?

Q. Well, in a general way.

A. Principally in Kentucky and recently in Oklahoma.

Q. Where did you begin training and buying and selling horses?

A. Near Lexington, in Kentucky and in Woodford County.

Q. How many years did you train horses in that vicinity about?

A. Well, right around ten to 12 years.

Q. I will ask you if you ever trained and dealt in trotting horses at Lexington, Kentucky?

A. I have.

Q. How long did you train and deal in horses there?

A. Several seasons, I don't just exactly know, farm was near Lexington.

Q. Is Lexington, Kentucky a market for trotting and pacing horses?

A. It certainly is.

Q. I will ask you whether or not it is not regarded one of the leading markets of the United States of that class of horses?

A. It is the "Hub of horse breeding and dealing.

Q. I will ask you to state generally Mr. Graves how trotting and pacing horses are sold outside and beyond private sales, what I am getting at now is auction sales?

A. Well, they are consigned by the owner, by description, usually as to what they will show up on the day they will be sold.

Q. Do you know what the principal auction markets for this class of horses are in the United States?

A. New York, Chicago and Indianapolis and Lexington Kentucky are the four principal places.

187 Q. Have you attended many of these special auction sales?

A. I have.

Q. Have you attended many of these special auction sales at other places?

A. I have.

Q. State the places you have attended these sales for the auction of these horses.

A. Four main towns that I have named beside Cambridge City and Danville, Kentucky.

Q. You bought and sold and handled this class of horses generally?

A. Yes sir.

Q. For your own account and for other people to any extent during the last 20 years?

A. I have during that time.

Q. I will ask you whether or not during this length of time you

have bought and sold many of this class of horses, or I will put it this way,—Have you during this time been dealing in this class of horses extensively or has it been limited?

A. Well,—no sir,—Had not very large consignments but generally every season had some.

Q. You have been dealing principally on your own account?

A. Yes sir.

Q. How many horses have you given racing records that you have trained and didn't receive records of 2:10 but beat 2:10 in trials?

A. Well, some eight or ten, I guess.

Q. How many have you trained and given trials better than 2:15?

A. I hardly kept track of all those things,—quite a number though,—15 or 20 or more than that given trials, I can't tell exactly.

Q. Are you able to state about how many you have trained and given record and trials better than 2:30?

A. Well the last time I counted was something like from 40 to 60—I think something right around 40.

188 Q. Do you know what the largest purses are that are given for horses in this City?—What I am trying to get at is the largest stakes being given for them?

A. At the leading training stakes they run from a thousand to twelve hundred or fifteen hundred dollars, but generally about a thousand dollars.

Q. When you speak of stakes this size you mean half mile tracks and not Grand Circuits?

A. I didn't mean Grand Circuits, I meant through South and and southwest.

Q. What is the purse offered in races for two and three year old futurities?

A. Well, for two and three year old trotters—trotters 2 year old ranges from one to \$5,000.00 and 3 year old from ten to twenty in the two year old.

Q. Did you ever train a race horse in either of these stakes, either the two year old or the three year old division?

A. I have.

Q. Did you ever win any division of them?

A. Won two year old division.

Q. I will ask you if it isn't a fact if you did not win two year old pacing division with Allice Maypes?

To which defendant objects as immaterial.

Overruled. Exception taken.

A. I did.

Q. Baroness Marguerite?

A. I did not.

Q. I will ask you if you gave Baroness Marguerite her record of 2:15 $\frac{3}{4}$?

Defendant objects as above.

Overruled. Exception taken.

A. I did.

Q. I will ask you if you gave Dick Hubbard his record?

Objected to as above by defendant.
Overruled. Exception taken.

189 A. I did.

Q. What was it?

A. 2:09½.

Q. I will ask you if you gave Gen. Adelle his record?

Defendant objects as above.

Overruled. Exception taken.

A. I did.

Q. What was it?

A. 2:10½ at four year old.

Q. Did you give Lizzie S. his record?

Objected to by defendant as above.

Overruled. Exception taken.

A. Yes sir.

Q. What was that?

A. 2:11¼.

Q. Did you give Dr. Mason his record?

Objected to by Defendant as above.

Overruled. Exception taken.

A. Yes sir.

Q. What was it?

A. 11:¾.

Q. How about Jean Ingelow?

Objected to by defendant as above.

Overruled. Exception taken.

A. I gave him 11:¾.

Q. And Lilly Clay?

Objected to by defendant as above.

Overruled. Exception taken.

A. I gave it to 2:12½.

Q. And Alverda Akins?

Objected to by defendant as above.

Overruled. Exception taken.

190 A. I gave her 2:12¾.

Q. What about Paddy B?

Objected to by defendant as above.

Overruled. Exception.

A. 2:13¼.

Q. Heatie B?

Objected to by defendant as above.

Overruled. Exception taken.

A. 2:13½.

Q. Queen of King?

Objected to by defendant as above.

Overruled. Exception taken.

A. 2:14½.

Q. Joe Harriman?

Objected to by defendant as above.

Overruled. Exception taken.

A. 2:15¼.

Q. How about Allice Maypes?

Objected to by defendant as above.

Overruled. Exception taken.

A. 2:14¾.

Q. You gave all these horses fast trials did you not?

A. Yes sir.

Q. I will ask you if you are acquainted with a pacing horse Geo. Gano?

Objected to by defendant as above.

Overruled. Exception taken.

A. I am.

Q. What is his record now?

A. His record now is 2:12¾.

Q. I will ask you whether or not you developed, trained and sold him?

A. I developed and drove him and 2:10 was his first race, at a 3 year old.

Q. What is his trial now for a mile?

A. Second in 2:2-4.

Q. What is the largest purse given for a trotting horse in the year 1908 Mr. Graves, speaking about the Grand Circuit now?

Defendant objects as incompetent, irrelevant and immaterial, witness not competent to testify.

Overruled. Exception taken.

A. Think it was \$50,000.00.

Q. I will ask you to state now if you can, what purses are given on what is known as the Grand Circuit for \$5,000.00 and more each season since you have been in the business the last four years,—limit it to the last four years beginning at Detroit and along down the line.

A. Purse in the M. & M. just one meet at Detroit, 24 trots first ten thousand.

Q. Now you can go right on down?

A. Buffalo one \$10,000.00 trot, one \$5,000.00 trot, one \$5,000.00 pace and at Syracuse a \$10,000.00 trot and a \$5,000.00 pace and at Hartford a \$10,000.00 trot, a \$5,000.00 trot, and a \$5,000.00 pace; at Redville they gave \$15,000.00 trot and a \$10,000.00 trot; at Columbus the M. & M. gave a \$10,000.00 trot, \$5,000.00 pace and a

\$5,000.00 trot besides, besides there were pulled off at Cincinnati a \$10,000.00 trot and a \$5,000.00 trot; at Lexington a \$5,000.00 trot 2 year old and 3 year old trot ranged from \$10,000.00 to \$22,000.00.

Q. I will ask you if they don't now give a handicap race for \$50,000.00?

Objected to by defendant as not proper examination.
Sustained. Exception taken.

Q. I will ask you to state how the information as to the training and as to the sale of horses is disseminated to the general public; that is to say how is this information placed before the public?

Objected to by the defendant as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. American Horse Breeder of New York, Trotter and 192 Pacer of Cleveland, Horsemen's Spirit of The Times and Horse Review of Chicago, Western Horsemen of Indianapolis, Kentucky Stock Farm, Lexington, Kentucky, and Breeder and Sportsman of San Francisco.

Defendant objects for the further reason it is not the best evidence and hearsay.

Overruled. Exception taken.

Q. I will ask you whether or not these said journals contain the names and the price of all of the horses sold during the season of the special public auction sales?

Objected to by defendant as above.

Overruled. Exception taken.

A. They do.

Q. In this way you know what the price of horses that sell at these sales is that you are acquainted with on the turf is it not?

Objected to by defendant as above.

Overruled. Exception taken.

A. It is.

Q. Now Mr. Graves I will ask if you are able to state when you have seen the individual horse, and what its confirmation is, what its speed and size, soundness and breeding and general quality as a race horse, if you are able from your experience as a trainer and driver and a dealer in this class of horses, to say what the market value of such a horse is, that is to say when you know all about them?

A. I do.

Q. Are you acquainted with the three year old mare Susie Mae, alleged to have been injured by the A., T. & S. F. about the 17th day of September 1907?

A. I am.

Q. Where did you first see this mare?

A. At Kansas City race track.

Q. At what time?

193 A. On Sunday prior to this date. About the 13th I think,—close to the middle of September.

Q. Did you make a sufficient inspection and examination of her as to enable you to state what kind of a mare she was as to soundness and general condition?

A. I did.

Q. Was she sound or injured?

A. She was sound.

Q. Was her individuality and general make up such as you would regard necessary in the making of a good race horse?

A. It was.

Q. Did you see this mare after that time?

A. I did.

Q. Where did you next see her?

A. At Lawrence, Kansas.

Q. Under what circumstance did you see her at Lawrence, Kansas?

A. First saw her when she came in the barn, just shipped in.

Q. Where did you next see her?

A. On the track.

Q. I will ask you about what date was that?

A. Somewhere near the 20th

Q. Under what circumstance on the track?

A. In a race.

Q. I will ask you to state how she performed in that race?

A. Very poorly.

Q. I will ask you if it isn't a fact that she was distanced in that race and after the second heat she walked from the $\frac{3}{4}$ pole or wire?

A. She was back far enough to be distanced, I can't state from where I was as I couldn't tell—she was near the 16th pole any way when the other horses finished.

Q. I will ask you if you are acquainted with her reputation as a three year old race mare?

194 A. I was.

Q. What was that reputation among horsemen?

A. She was considered one of the best in the west,—very much highly spoken of after the Topeka races.

Comes now the defendant and moves to strike out that part of witness' answer about reputation for the reason it is hearsay.

Sustained. Exception taken by plaintiffs.

Q. With your knowledge of this mare, if she was able to trot three heats better than 2:20 or as good as 2:20 over half mile tracks and 5 heats better than 2:23, what would be her market value at the time you saw her at the Kansas City track the Sunday previous to the time she was shipped? What would be a fair market value of this particular mare in the condition you saw her in, if she could trot that fast?

Objected to by the defendant as incompetent, irrelevant and immaterial and tends to vary the terms of a written contract.

Overruled. Exception taken.

A. Around \$2,500.00.

Q. Are you able to state what the market value of such a mare as Susie Mae would be if she could trot two heats at 2:20 over half mile track and in the condition she was at the time you saw her,—what would be the value on her over half mile track?

Objected to by the defendant as above.

Overruled. Exception taken.

A. She would be worth quite a bit more money over half mile track,—from \$3,000.00 to \$35,000.00.

Q. You speak of half mile track? What is the difference in space of time between mile and half mile track to the average horses?

A. You say what if the difference?

Q. Yes sir.

A. 3 to 5 seconds.

Q. Would a mile in 2:19 or 2:18 over ordinary half mile track be as good performance as 2:15 over Kansas City mile track?

195 A. It would be equally as good.

Q. If Susie Mae, the mare in controversy here had her Suspensory ligaments and main tendon pulled from her knee joint, are you able to state what effect it would have on her for that race?

A. It would be very serious.

Q. How would it effect her value Mr. Graves if any?

A. It would be just a chance then.

Q. What do you mean by a chance?

A. To ever get so she could race again. She would never be a \$2500.00 mare again.

Q. You are acquainted with the market value of this mare if she was injured and in that condition,—are you able to state what the market value would be?

A. I would think so.

Q. What would she be worth?

Objected to by defendant same as above.

Overruled. Exception taken.

A. With her breeding and chances of being used in other ways would probably bring her value to about \$350.00 or \$400.00.

Q. I will ask you to state what the chief value was and consisted of and in at the time you saw her in Kansas City?

A. Principally to win and her ability of a stake when she could win.

Q. Is a race horse which can trot 2:12 to 2:15 with a record of 2:29 $\frac{1}{4}$ more valuable or is a horse more valuable when they have a slow record and can trot faster?

A. They are more valuable when they have a slow record and can trot faster.

Q. Are they able to win more money?

A. They are.

Q. Are you acquainted with Stallion McRoberts?

A. I am.

Q. Was he considered a good sire of race horses?

196 Objected to by defendant for the reason it is immaterial.
Overruled. Exception taken.

A. He was.

Q. Would you say that a mare sired by Mac Roberts out of a mare with a trial of 2:14½ trotter and next dam to Dam of Robert Mac 2½ by Hector Wilkes was good breeding for a race horse or not?

Objected to by defendant as above.

Overruled. Exception taken.

A. It is.

Q. Are you acquainted with the purses and associations and tracks through Kansas and Oklahoma?

A. Yes sir.

Q. How much could a three year old trotter win each week that they could trot as fast as the mare Susie Mac?

Objected to by the defendant as incompetent, serves to vary the terms of a written contract.

Overruled. Exception taken.

A. Around \$250.00.

Cross-questioned by Mr. GILMORE:

Q. How long have you been in Kansas City Mr. Graves?

A. A little over a year.

Q. Mr. Graves your business has been largely that of training horses and handling them on the track?

A. Yes sir.

Q. And where have you handled them, in Lexington, Ky.?

A. Yes sir, in Kentucky.

Q. As I understand your information as to a good many of these horses is obtained through various journals devoted to the racing and stock breeding?

A. Yes sir.

Q. The price and a good deal of information, of course you are not able to view the horses personally on the various circuits?

A. No sir.

197 Q. And you don't do this?

A. No sir.

Q. Now Mr. Graves this question of race horses involves certain degree of uncertainty always does it not?

A. Yes sir.

Q. Now, as a matter of fact Mr. Graves a race horse always performs differently on one track from another,—that is they do not always perform as well on all occasions?

A. Usually around the same time.

Q. Not exactly?

A. No, not exactly, it depends on the driver somewhat.

Q. Isn't it a fact that when race horses are matched in races and are very close in time that one will beat sometimes and others will beat at other times?

A. Sometimes they do in a close match.

Q. Now do you know anything about the value of the horse or the value of a horse like that of Susie Mas, aside from its racing qualities?

A. I judge I do.

Q. Have you ever dealt in horses aside from race horses?

A. Yes sir.

Q. Eliminating the feature of her being a race horse what would you say as to her value on the market at Kansas City the time you saw her, in the condition in which you saw her at the time.

A. Well I should say around a thousand or fifteen hundred dollars.

Q. Outside of any racing qualities I mean at the time you saw her here in Kansas City, to put her on the general horse market without any reference to being a race horse, to sell her in a general horse market.

A. Well, there are different ways you could construe that. She might be a very fast mare and not be sold for racing purposes but be very desirable for driving purposes.

Q. What I am speaking about to put her on the common ordinary horse market eliminating the speed that she possessed.—just 198 take her as a horse for her general uses on the general horse market?

A. Well, that would be hard to tell.

Q. I am asking you now whether you have engaged in that kind of business to say what her value is?

A. I want to get at the idea of whether you are eliminating speed qualities or not or to take her as an ordinary driver?

Q. I mean that of an ordinary buyer, if you would put her on the ordinary market without any breeding or record?

A. If you would put her on the ordinary market without any breeding or record or trial she would bring, her individuality and manners, in the neighborhood of \$350.00 to \$500.00.

Q. Now at the time you examined her in Kansas City, did you put her to any test, personally, yourself?

A. I did not.

Q. Your knowledge of her then comes from what you obtained, what other people say about her record, etc.?

A. Not all together.

Q. When did you test her?

A. The summary on her races prior to me seeing her at Kansas City.

Q. You got that through the journals as you kept track of these horses?

A. In various ways.

Q. Now in these auction sales that you have spoken about the horses are put up at these auctions and various parties bid on them?

A. Yes sir.

Q. It is not a fact that horses bring uniform prices at these auction sales do they?

A. Well there is a difference in horses,—you take a draft horse or what we call a heavy horse they usually bring about the same price.

Q. I am speaking of race horses, whether or not their prices vary?

A. Yes sir.

Q. The purchasers must have or may have individual ideas that wouldn't appeal to every body else in these sales?

A. Yes sir.

Q. That accounts for the fact then that a large variation is made in the prices of horses that may occur at these auction sales? Some *but* for one purpose and some for another?

A. Yes sir.

Q. Now I don't know whether I understand it right or not but did I understand you to say that a horse with a record for $1\frac{1}{2}$ miles was of more value than a horse with a record for a mile track?

A. Yes sir.

Q. What you mean by that is where they will run a mile over a half mile track and make certain speed on that really speaking they would be more valuable then if they could run the same speed on a mile track.

A. They will be more valuable by running the same speed over half mile track.

Q. How many times had you seen Susui Mae prior to the time you saw her at Kansas City?

A. Don't believe I had seen her at all.

Q. That was the first time?

A. Yes sir.

Q. Second time was when you saw her at Lawrence?

A. Yes sir.

Q. When did you next see her?

A. I never saw her race since that time.

Q. How many times did you see her while you were there at Lawrence?

A. Several times, a number of times.

Q. How many times did you see her on the race track there?

A. Saw her one afternoon.

Q. You were there to look after other horses yourself Mr. Graves?

A. I was.

Q. How many horses did you have there?

A. I had three.

Q. You were really giving a larger part of your attention to your horses were you not?

200 A. No sir not the evening I saw her there.

Q. You were the most of the time of the meeting there were you not?

A. I was giving them all the time I thought they required.

Q. Mr. Graves, a mare of this character might prove to be quite

valuable for breeding purposes, even if they were disabled for racing purposes might they not?

A. That depends.

Q. What is the probability?

A. Well, what you breed to and development of the colt, etc.

Q. But as far as breeding purposes are concerned, you wouldn't consider that she was in any way disabled for that would you?

A. Well, in a certain *was* she would be,—there are a great many people who don't like to buy colts from blemished horses.

Q. But as a matter of fact if the colt shows up al-right that isn't blemished this would not have any effect on some accident or injury which may happen to the mare?

A. No sir.

Q. And I understand you to say that you would consider on account of her pedigree and breeding that she would be worth more on that account?

A. Yes sir.

Q. Then you also believe the same if this mare with that pedigree was bred to a horse of a good pedigree that she would be a good valuable good mare, more valuable than if she had no pedigree?

A. If the produce turned out al-right it would.

Q. Had she passed a stage with her pedigree and with that of an equally good horse can you tell what her offspring would be and would it be valuable?

A. I should think it would be valuable.

Q. Now Mr. Graves there is no way by which you could forecast at the beginning of the season, or at any period in a season the earnings of a particular race horse would make, no way to estimate it?

201 A. Only by what you have got according to the speed.

Q. There is no way by which you can actually estimate that?

A. Not exactly,

(Signed)

O. B. GRAVES."

The hour of 6 P. M. having arrived the jury is by the court duly admonished and adjournment is taken to 8:30 A. M. April 19th.

At the hour of 8:30 A. M. April 19th 1910 court is reconvened all jury and all parties as heretofore, the trial of said cause is resumed.

Mr. SMITH: The deposition of Geo. T. Farish of Topeka, Kansas, taken at the office of Whitecomb & Hamilton, attorneys at law, at the City of Topeka before Sarah Houston, Notary Public, is now offered in evidence on behalf of the plaintiffs.

Caption is omitted by agreement of counsel.

Mr. Smith reads:

"GEORGE T. SMITH of lawful age, being first duly sworn, deposes and says:

Direct examination.

By H. H. SMITH:

Q. State your residence and occupation Mr. Farish, and name?

A. I sleep at the Fair Grounds and I board at 2005 Filmore Street. George T. Farish—F-a-r-i-s-h,

Q. What is your occupation?

A. I handle trotters and pacers. I buy and sell horses once in a while.

Q. How long have you been engaged in the business in Topeka?

A. I have been in Topeka six years this month.

Q. How long have you been engaged in this business at Topeka and other places?

A. I began the horse business in '85 in Kentucky.

202 Q. State what particular part of the horse business you have been engaged in since you have been in the horse business.

A. Well, since I have been in the horse business I have trained trotters and pacers, and as I said before, I buy and sell when I have a chance to make anything in buying and selling a horse, but my business is training horses.

Q. I understand you to say that you have been engaged in training trotting and pacing horses for yourself and other people and buying and selling occasionally?

A. Yes sir.

Q. Have you while you have been training horses raced any of the horses you have trained in this time?

A. Yes sir.

Q. About how many do you race each year?

A. Well, I have been racing horses for 22 years. I raced all the way from one to six head. This summer I had six head and last year I had out five.

Q. You state you have bought and sold horses incidentally to the business of training them?

A. Yes sir.

Q. Have the horses that you have bought and sold in this time been trotting and pacing horses?

A. Why, some of them have and some of them saddle horses. Some of them just road horses—nice roadsters. I do not fool with any draught horses.

Q. Has your experience in buying and selling and training trotting horses been to that extent that you are able to say what the value—market value of a trotting and pacing horse is when you know the speed, individually, general conformation, and qualities, size and breeding of the horse?

A. Yes sir. I know pretty well what they are worth.

203 Q. State whether or not they have special, occasional sales for this class of horses in the United States?

A. Yes sir, they have a good many of them. There is one in Chicago right now. They had one last month in New York at Madison Square Garden. The horses averaged about \$523.00.

Defendant moves to strike out that part of said answer giving price of horses.

Sustained. Plaintiff's except.

Q. Have you ever attended the sales at Chicago and New York and other places in the time you have been engaged in the business?

A. No sir, I have attended them at Kansas City and St. Louis, but I haven't attended any at Chicago or New York.

Q. I will ask you whether or not the *turf* journals that are published generally contain the prices of horses sold at these special sales?

A. Yes sir. They give the price of each horse and the name of the man who buys him.

Q. I will ask you now to state whether you have examined any turf journal recently, and if so state what turf journal, and the average price of horses published in that journal.

Defendant objects to question as incompetent, irrelevant and immaterial and not the best evidence.

Overruled. Exception taken.

A. I read the Review and read the prices that the horses were sold for at Madison Square Garden last month.

Q. How many horses were sold at this sale, and what was the average price published in the Review?

Same objection.

Overruled. Exception taken.

A. In that sale there were 673 horses I believe. I could not say exactly the number, but somewhere along there.

Q. What was the average price?

Same objection.

Overruled. Exception taken.

204 A. They averaged \$523.00.

Q. These horses that you speak of selling in this sale, I will ask you if you are able to state from your information derived from reading the Review what class of horses these were as to speed and age.

Same objection.

Overruled. Exception taken.

A. They were yearlings up to aged horses. Some of them fast records and some of them slow records.

Q. Are you able to state how many of these special sales as a rule have been held in the last ten years in the United States?

A. I could not say how many are held, but they hold quite a number every year. The one in Chicago now is the second this fall. There will be four or five more between now and April.

Q. Do you follow the published results of these sales as they are published in the horse Reviews?

A. Yes sir. I read them all and that's the information I get is through horse papers.

Q. You stated that you have been engaged in training trotting and pacing horses and buying and selling trotting and pacing horses since 1885. Is that right?

A. Yes sir. That is when I began the work.

Q. I ask you now if you know the fair market value of a trotting mare, 3 years old, 15 hands and one inch high, a good individual, a good headed game race *made*, trained only one season, which can trot three heats better than 2:20 on a half mile track, and 5 heats better than 2:23 on a half mile track in a competitive race against horses, a 3 heats in 2:15 or better on a mile track?

A. Well, by good information about that kind of a horse that my I think I know about what they are worth.

Q. You may state what the market value of a mare described in the question above was in the year of 1907.

95 The defendant objects to the question as incompetent irrelevant and immaterial. Not a proper hypothetical question, calling for the opinion and conclusion of the witness who has not been shown qualified to answer, and for the further reason that it seeks to elicit testimony tending to vary or contradict the terms of the written contract.

Overruled. Exception taken.

A. Mare like that would be worth \$2,500.00.

Defendant moves to strike out answer of witness for the reason stated in last objection.

Overruled. Exception taken.

Q. When you say a mare like that is worth \$2,500.00, do you mean to say that is her fair market value?

A. I would say that she would sell for that most anywhere.

Q. You stated in your previous answer that you have been living in Topeka and training horses for the last six years?

A. Yes sir. Six years ago this month.

Q. I now ask you whether you have been racing horses in the state of Kansas in that time, or in other states. State where you have raced in that time?

A. The last six years I have raced in Kansas, Nebraska and Iowa and Oklahoma.

Q. Have you raced both trotters and pacers in that time?

A. Yes sir.

Q. What have been the purses offered where you have been racing in associations in the last three years in Kansas?

Defendant objects to the question as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. \$300.00 to \$1,000.00.

Q. I will ask you now whether the mare described in the question

206 above which you have answered, could win the purses which have been given in the circuits where you have raced for this class of horses; that is to say, of three year old trotters?

Defendant objects to question as incompetent, irrelevant and immaterial, calling for an opinion or conclusion of the witness, who has not been qualified as an expert on such matters.

Sustained. Exception taken.

Q. What would be the earning capacity of such a horse per week if she could win all the time where you have raced in this class?

Defendant objects to the question for the same reason as last above.

Overruled. Exception taken.

A. They could win \$200 to \$250.00 a week easy enough.

Q. In the time that you have been training trotting and pacing horses I will ask you whether you have become familiar with the treatment of horses' legs that are injured from racing or from any other cause?

A. Yes sir.

Q. I will ask you whether or not in your experience as a trainer you rely upon your own knowledge as to the treatment of horses that have received injuries rather than on veterinary surgeons?

Defendant objects to the question as leading, incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. Yes sir.

Q. I will ask you if you are able to state from your experience whether a horse that is injured by the suspensory ligaments being strained or pulled out or strained at the knee joint; that is, whether from your experience such a horse is able to race after that kind of an injury.

Defendant objects to question as incompetent, irrelevant and immaterial, and calling for an opinion of the witness which he has not been shown qualified to give.

Overruled. Exception taken.

207 A. My experience has been that a horse like that is not any good for racing; they cannot stand it.

Q. State whether you have had a horse injured in this manner while you have been training horses?

A. I have had tendons injured that way. They were never any more good afterwards as a race horse.

Q. I will ask you if you were at the Topeka Exposition or Fair in the Year 1907?

A. Yes sir.

Q. I will ask you if you saw the black three year old track mare Sousa Mc race in the three-year old race at that time?

A. Yes sir. I saw her when she won second money—\$1,000 stake.

Defendant objects to the latter part of the above answer as not responsive to the question.

Sustained. Plaintiffs except.

Q. I will ask you to state whether in your opinion she could have won the race or not?

Defendant objects to that question as incompetent, irrelevant and immaterial.

Sustained. Plaintiff excepts.

Q. Do you know what the purse was that they were racing for at this meeting?

Same objection.

OVERRULED. Exception taken.

A. \$1,000.00 stake.

Q. I will ask you to state how you knew about the purse?

A. Because I had one I wanted to start myself, but I started mine twice as a two year old and the rule of that race provided that no three year old should start that had ever started in a race before.

Q. I will ask you whether or not it is a fact that the Topeka Association published these purses and notified by mail all of the trainers and owners in this vicinity of the amount of the purse and the conditions on which the purse was offered?

208 A. Yes sir.

Q. I will ask you if in this way and in the manner in which you described in your other answer you were able to arrive at the amount offered for the three year old race?

A. Yes sir. That's the way we got it. The Secretary notified us what the amount was. That is the way we find out. We are notified through the mail.

Cross-examination.

By A. A. SCOTT:

Q. Would such an injury to a horse as was described to you be of a permanent nature?

A. Yes sir.

Q. Necessarily?

A. Yes sir.

Q. Do you mean to state that the horse would simply be of no use for racing, or would be useless for any purpose?

A. No use for racing.

Q. But it might be used for driving?

A. Yes sir. It might be used for driving or breeding purposes.

Q. What would such a horse as has been described in the question asked you on the direct examination bring for breeding purposes after sustaining the injury described?

A. Well, they sell at various prices, from \$500.00 to \$1,000.00 that kind.

Q. What, in your opinion, would be the value of a horse with the record described, for breeding purposes after sustaining such an injury?

A. Well, a mare like that ought to be worth \$500.00 anyway.

Q. And perhaps it would bring more?

A. It might if some man wanted it pretty bad.

(Signed)

GEORGE T. FARISH.

209 Mr. SMITH: The deposition in the above entitled action is now offered by the plaintiffs, being the deposition of John Skaggs of Shawnee, Oklahoma, taken before Albert T. Gardiner a Notary Public on the 12th day of November, 1908, to be read in evidence in behalf of the plaintiffs in this action, now offered in evidence without reading the caption.

Mr. Smith reads:

"Direct examination by H. H. SMITH:

Q. State your residence, occupation and name.

A. John Skaggs, Shawnee, Oklahoma, Occupation, horse business.

Q. How long have you been in the horse business?

A. About eighteen years.

Q. What kind of horses have you handled in that time?

A. I have handled all kinds.

Q. In this time have you handled any trotting and pacing horses?

A. Yes sir.

Q. Have you at any time in this time trained or raced any horses?

A. Yes sir.

Q. Were you training horses in the spring and summer of 1908?

A. Yes sir.

Q. Are you acquainted with the black trotting mare, Sousa Mc-

A. Yes sir.

Q. Did you train her at any time?

A. I worked her a while.

Q. About how long and for whom did you work her and at what time?

A. I don't know just how long I did work her. Between two and three months, I guess it was. Along last spring sometime, for Mr. A. M. Coffin.

Q. State what her condition was as to soundness at the time you begun to work her, and state also, if you know, what condition she was in at any time while you worked her as to soundness.

210 A. She seemed to be sound, except her front leg had a bad tendon.

Q. State what tendon it was that was bad and what was the nature of the injury, if you are able to state.

A. It was from her knee down, her right tendon of the left front leg. I believe it was her front tendon.

Q. What — the result of her training when she was in your hands, as to soundness?

A. Well, her right tendon of the left front leg was enlarged and she seemed to go a little lame on it when we began to work her.

Q. How fast did she go a mile when you worked her?

A. I don't think I ever worked her a mile.

Q. State whether or not this mare was sound enough to stand training?

A. Well, my judgment is that she was not.

Q. Would you or not, consider that she was broke down in that tendon?

A. I would consider it a bad tendon, yes.

Q. State what your experience is in injuries as to that character.

Objected to by the defendant for the reason that it is irrelevant, immaterial and incompetent.

Overruled. Exception taken.

Q. How long have you raced horses Mr. Skaggs?

A. I have been racing them off and on for about eighteen or nineteen years.

Q. In that time have you had much or little experience with horses that had injuries of this character, or whose tendons were in the same condition this mare's were in?

A. I never had one in her condition.

Q. Have you raced horses where tendon- were injured in any respect?

A. No sir, I never raced any that way.

Q. State what your opinion as to whether or not this mare is capable of racing.

Defendant objects same as above.

Overruled. Exception taken.

211 A. My opinion is that she would not race.

Q. Is your opinion based upon the unsoundness that you speak of?

A. Yes sir.

Q. What did you do with the mare after you trained her awhile?

A. I laid her up in the stable.

Q. You state that you trained the mare for A. M. Coffin. Who is A. M. Coffin?

A. A real estate man here.

Cross-examination by Mr. GREEN:

Q. Does Mr. Coffin own the mare?

A. He claimed her at that time.

Q. When was that? The spring of this year?

A. Yes sir.

Q. How old is this mare?

A. My judgment is that she is about five years old.

Q. Is she a trotter or a pacer?

A. A trotter.

Q. You don't know how that tendon became injured?

A. No sir.

Q. Do you know where the mare is now?

A. The last time I saw her Mr. Smith had her.

Q. Do you know what her condition is at this time?

A. No sir.

Q. How long have you known the mare?

A. Since about the first of January.

Q. 1908?

A. Yes sir about that time.

Q. What color is she?

A. She is a black mare.

Q. Is she a large or a small mare?

A. I would call her a small or medium sized.

Q. When did you begin working her?

A. I don't recall the time I did commence working her.
212 Some time along in February or March.

Q. When did you quit?

A. I could not say that. I had her two or three months. Between two and three months. I had her in my care longer than that, but I was just feeding her for Mr. Smith for awhile.

Q. You say you never raced any horses that had tendons such as this mare has?

A. No sir.

Redirect examination by Mr. SMITH:

Q. State whether you worked this mare fast or not?

A. No sir I did not work her very fast.

Q. Did you work her any where near her speed?

A. Not over an eighth at any time.

Q. What was the reason you did not work her fast?

A. She was not in condition to work fast.

Q. You state that she went lame with this kind of work?

A. Yes sir.

Cross-examination by Mr. GREEN:

Q. Was the mare in training when you got her?

A. No sir. I think they were just caring for them.

Q. She had not been worked previous to the time you got her?

A. I don't know.

Q. She was not in training at the time you got her?

A. She was in the stable but I don't know if she was in training or not.

(Signed)

JOHN SKAGGS."

213 C. E. ROBINSON being called and duly sworn as a witness on behalf of the plaintiffs testifies as follows:

Direct examination by Mr. SMITH:

Q. Mr. Robinson are you the C. E. Robinson who is a plaintiff in this action?

A. Yes sir.

Q. Where do you live at this time?

A. Oklahoma City.

Q. What is your business?

A. Handling, training and racing trotting and pacing horses.

Q. How long have you lived at Oklahoma City?

A. Well, I trained horses there last summer and then moved to Roth, Oklahoma, during the winter and started back there in the spring to run a public stable this summer.

Q. How many horses have you now in your stable and training?

A. I have four.

A. What kind of horses are they?

A. Trotting and pacing horses.

Q. How long have you been engaged in training trotting and pacing horses?

A. Well, in a way all my life but I have been at it continually since 1900.

Q. How long have you lived in Oklahoma?

A. Since the fall of 1907.

Q. Where did you reside before that time?

A. Kansas a part of the time and in South Dakota most of the time. My name is in Kansas.

Q. Where about?

A. South Haven, Kansas.

Q. How long have you, previous to 1900, what business were you engaged in?

A. Previous?

Q. Previous to 1900, were you training any other kind of horses?

A. I handled running horses quite a bit.

114 Q. Previous to that time?

A. Yes sir.

Q. Who were you employed by prior to 1907, the year 1907, if anyone?

A. Before that?

Q. Before 1907.

A. By the Running Mead Stock Farm, Armour, South Dakota.

Q. Who was the Running Mead Stock Farm at that time owned and controlled by?

A. M. Smith and H. H. Smith.

Q. Were you training at the time you were working for the Running Mead Stock Farm, trotting and pacing horses?

A. What is the question?

Q. Question repeated.

A. Yes sir.

Q. About how long did you work for the Running Mead Stock Farm?

A. I worked 7 years off and on but about 4 years altogether.

Q. How many horses did they usually train during the season if you know?

A. Well, from 6 to 15, to 13 or 14, somewhere along there.

Q. Was that farm engaged exclusively in racing horses or were they engaged in breeding horses and selling?

A. They were engaged in breeding horses and selling and racing.

Q. Did you while you were employed at that farm assist in any way in the selling and buying of horses?

A. Yes sir.

Q. You may tell the jury how the horses at that farm were trained and how they were sold generally speaking during the time you were employed there.

Objected to by the defendant as immaterial.
Overruled. Exception taken.

Q. Privately or publically or how?

A. They were raced in the summer time and trained in the fall for speed to show up good in the sales during the winter at Chicago or Indianapolis or New York wherever they were going to be 215 sold, they were trained on the race track there.

Q. Did you accompany the horses or have charge at any time you were employed there or assist any person in charge, with the sale of the horses?

A. Yes sir.

Q. At what places?

A. Indianapolis and Chicago.

Q. What were you doing in the year 1907?

A. I was training and racing horses—trotting and pacing horses.

Q. For yourself or somebody else?

A. Partly on my own account and partly for the Running Mead Stock Farm.

Q. What horses did you have of your own?

A. Nancy Alden.

Q. Are you acquainted with the black trotting mare Sousa Mc?

A. Yes sir.

Q. In controversy in this action? Did you have any interest in that mare?

A. I had a racing interest in her to get part of her winnings, I owned no interest in her.

Q. Who did she belong to if you know?

A. She belonged to S. H. Smith.

Q. Who is S. H. Smith?

A. He lives in Washington, D. C. He has something to do with the Interstate Commerce Commission, I do not know what exactly, and he owned an interest in the Running Mead Stock Farm.

Q. Where did you first see—did you have charge or control of the training of this mare or do you know who did?

A. Well, I and Mr. Moore trained her together.

Q. When did you begin her training?

A. In the spring of 1907, along in March or April.

Q. How fast could she trot when you began her training?
216 A. I don't know when he begun her training, she didn't show much speed, but we didn't work her fast on account of her not being ready to work fast.

Q. Where did you first race her in 1907?

A. We started first at Courtney, North Dakota, in June.

Q. Against what kind of horses?

Objected to by the defendant.

Overruled. Exception taken.

A. In a 33 trot against aged horses.

Q. How did she finish?

A. She finished second.

Q. About how fast was the race?

A. The horse that won the race took a mark 2:25 $\frac{1}{4}$

Q. What kind of a track was it?

A. A common half mile track.

Q. Where did she race next?

A. She started next at Fessenden, North Dakota.

Q. In what kind of a race?

A. Aged horses 35 class.

Q. Where did she finish in this race?

Objected to as immaterial.

Over ruled. Exception taken.

A. She won the race in three straight heats.

Q. Where did she next start?

A. Harvey, N. D.

Q. Where did she finish in this race?

Objected to by the defendant.

Over ruled. Exception taken.

A. She finished third.

Q. What kind of horses did she start against?

Objected to by defendant.

Over ruled. Exception taken.

217 A. Aged horses.

Q. What kind of a track was it she raced on here and at the previous place you spoke of where she won, what kind of a track at Harvey and at Fessenden?

A. The Harvey track is a very poor half mile track and the Fessenden is a very fair track.

Q. How fast did she step at Fessenden?

A. She stepped a mile in 2:24 $\frac{1}{2}$.

Q. How fast in the race at Harvey?

Objected to by the defendant.

Over ruled. Exception taken.

A. I don't know, they didn't step very fast there, not faster than 28 or 29, it is a very bad track there, muddy.

Q. Did you see this mare any time after the meeting at Harvey?

A. I accompanied her back to Armour.

Q. Do you know where she went from Armour?

A. I think to Manhattan, Kansas.

Q. Did you see her race at Manhattan?

A. No sir.

Q. You don't know where she raced from that time on except by hearsay do you?

A. That's all.

Q. Where did you next see the mare after she left Armour, South Dakota?

A. I seen her next at Kansas City, Missouri, along the 14th or 15th of September.

Q. After the mare left Armour, South Dakota, did you have any thing more to do with her training?

A. I handled her again—I took charge of her along about the 24th or 25th of September from Lawrence, after her injuries.

Q. Did you have any other horses at that time?

A. I had one horse of my own and two horses belonging to H. H. Smith.

218 Q. What was the name of those horses?

A. You mean Mr. Smith's horses?

Q. Yes sir.

A. John Drew and Don Ex Tallion.

Q. What kind of horses were they?

A. Don Ex Rallion was a pacer and John Drew a trotting.

Q. Did you have charge of the training of these horses during the time you had Sousa Mc under your care?

A. Yes sir, I and Mr. Moore together, you mean after I took her under my care?

Q. No, before you took her under your care.

A. Yes sir, I and Mr. Moore together.

Q. You say the next time you saw her at Kansas City, now Mr. Robinson, tell the jury what the condition of this mare was prior to the time you saw her and up to the time you saw her at Kansas City, previous to her being shipped, at the time she was alleged to have been injured, was she sound or unsound?

A. She was perfectly sound in good racing condition, not in perfect racing condition but as far as sound is concerned, she was in good shape.

Q. What do you mean by not first class racing condition?

A. She hadn't been trained long enough to be in first class racing condition, but she was good as she was—I mean she had room to improve, by more training.

Q. Tell the jury about what kind of a mare she was as to size, general things, confirmation, and age.

A. She was a black filly, 15 hands high, 3 years old, a trotter, and sound. She was a perfectly reliable race mare and could trot three times in 20 on a half mile track.

Q. Did you ever see her trot a mile on a mile track?

A. Yes sir.

Q. Did you time her?

219 A. Yes sir.

Q. About how fast?

A. She stepped a mile there in 2:18.

Q. Did you step a part of that mile faster than a mile in two minutes and 18 seconds?

Objected to as leading and suggestive.

Overruled. Exception taken.

A. She stepped the last part of that mile, the last half, in about 1:47.

Q. At what rate for a mile would that be?

A. 2:14.

Q. Tell the jury about how fast in your opinion from your knowledge of this mare, condition, and her speed, the race you saw her in, how fast could she trot a mile over a mile track such as Kansas City if stepped to her limit.

Objected to as incompetent, irrelevant and immaterial.

Over ruled. Exception taken.

A. Well, I would judge from the ease she stepped this mile with she would step a mile in 2:10 over a good mile track, Kansas City is a very poor mile track.

Defendant moves to strike out answer for the reason shown by testimony of witness it is merely conclusion.

Over ruled. Exception taken.

Q. At the time this mare was shipped from Kansas City where was she shipped to?

A. She was shipped to Lawrence, Kansas.

Q. About what time was she shipped?

A. About the 16th, somewhere along there, of September, 1907.

Q. Just tell the jury about what the circumstances of her shipment were and what you had to do with it if anything?

A. In the shipping of her?

Q. Yes sir.

A. Why I ordered a car about noon over the telephone, 220 me and Mr. Smith together went to the telephone and ordered a car from the Santa Fe road. They told us to load the horses about four, so we moved the horses from there to the Hunter transfer barn to have them there to load when they spotted the car for us and it was about six before the car was ready for us to load. We loaded the horses at six o'clock and were supposed to get out at nine. They told us the freight would leave at nine. We told them we wanted—

Defendant objects to what he told them or they told him unless he identifies some particular officer.

A. The agent told me.

Q. Who was this you were talking to?

A. The agent at Kansas City.

Q. In what place?

A. In the freight depot.

Q. Where about is that freight depot—what railroad?

A. The Atchison, Topeka and Santa Fe.

Q. The agent of the freight depot of the Atchison, Topeka & Santa Fe were you?

A. Yes sir.

Q. In Kansas City, Mo.?

A. Yes sir.

Q. Now state just what your conversation was with him?

A. I told him I had race horses and wanted to get off on a fast freight that didn't make any stops so they wouldn't be jerked around and would be in good condition, and they told us there was a Red

Ball freight going at nine o'clock and they would put us on that and we loaded with that understanding.

Q. Now tell the jury about what kind of a building or office that is there.

A. Well, it is a big long building.

Q. Were you in the office of the agent of this company?

A. You mean the agent or the whole building?

221 Q. Where did you have this conversation with the agent?

A. In the office. In one of their offices, there is a good many offices there, the office where they write out the bills, make up the bills and contracts.

Q. Now Mr. Robinson, you may state what the conversation was that you had with the agent prior to the loading of the horses.

To which the defendant objects as incompetent, irrelevant and immaterial, tending to vary the terms of a written contract.

Over ruled. Exception taken.

A. Well, just in regard to the shipping, we impressed upon his mind that we wanted a through freight.

Object.

Sustained.

Q. What did he say to you, that he would put you out on the red ball freight?

Objected to as leading.

Sustained. Exception.

Q. Just state what the conversation was.

Defendant objects as repetition.

Over ruled. Exception taken.

A. I told him we had race horses and wanted to get to Lawrence in good shape and wanted to go on a through freight and he told us about the Red Ball freight and said he would put us on that freight, never said anything about any other kind of a freight.

Q. Did you tell him what you wanted to go to Lawrence for?

Objected to by defendant.

Sustained. Exception.

Q. What did you say about going to Lawrence?

A. I told him we had a race there and wanted to go on a good freight so they would be in good shape and didn't want them knocked around.

Q. What time did you load the horses?

A. We had them loaded at 6 o'clock.

222 Q. How long were you if you know, tell the jury in the yards of the Atchison, Topeka and Santa Fe?

A. Well, we were in the yards until midnight any way and they moved us from there to Argentine and kept us there till six next morning.

Q. Tell the jury what happened during that night to those horses, how many horses did you have in the car?

A. Four.

Q. What were the names?

A. John Drew, Don Ex Tallion, Nancy Alden and Sousa Mc.

Q. Just tell the jury how the horses were situated in the car and what kind of a car?

A. Sousa Mc and Nancy Alden were in one end of the car and the other two in the other end. We had ropes across in front of them and a rope running back between them to keep them apart and then had them cross tied, was the way they were fixed in the car.

Q. Well did the horses—were you with the horses all night?

A. Yes sir, I and Mr. Moore.

Q. Do you know and are you able to tell the jury whether they were injured during the night or not?

A. Yes sir.

Q. You may tell the jury how they were injured and about when you know, this particular mare.

A. They pulled us away from the da-rick platform about nine o'clock into the main yard to switch us around, there were lots of box cars they had to get out and they switched us around the yard most all night and knocked these two horses especially down several times; of course they knocked the others down, but they were not injured, these two seemed to get the worst of the bumping, and they kept our car running around the yard here and there, from one track to another, and bumped us around, and along about ten o'clock they moved us up to Argentine, where they still continued their hauling around and bumping.

Q. Now, during the night did you notice any injuries to this mare?

A. Sousa Mc.?

Q. Yes sir.

A. I noticed her holding up her leg like she was injured when we first got to Argentine.

Q. What leg was it?

A. Her left front leg.

Q. Did you make any examination of it at that time?

A. Not while the train was in motion, because it was dangerous, being knocked down so much, the horses had bandages on them and you couldn't see without taking them off and it was too dangerous to take off the bandages.

Q. At what time did you make an examination of the mare—you and Mr. Moore?

A. We made an examination of them after we got out of the yard at Argentine I did.

Q. About what time was that?

A. About, I judge half past six o'clock, somewhere along there.

Q. What condition did you find the mare Sousa Mc. in?

A. I found her leg swollen from the knee down.

Q. Which leg?

A. Her left front leg.

Q. Did you have any conversation with anybody while in the yards, anybody connected with the Atchison, Topeka and Santa Fe?

A. Yes sir.

Defendant objects for the reason the question calls for a conclusion of the witness.

Q. Did you have any conversation with reference to handling of these horses with any employee of the Atchison, Topeka & Santa Fe Company during that night?

Defendant objects for the reason it calls for a conclusion of witness, incompetent, irrelevant and immaterial.

Over ruled. Exception taken.

A. I spoke to the switchman.

Q. How do you know he was the switchman?

A. He was carrying a lantern like they use in the yard and mounting here and there and I suppose he belonged to the railroad in some way.

Defendant moves to strike out testimony for the reason it is a conclusion of the witness.

Over ruled. Exception taken.

Q. Well, what conversation did you have with him?

A. I asked him once if he thought he was moving a bunch of box cars, and he said they were all box cars as far as he knew, he didn't know there were any horses in that car.

Q. Anything else said there at that time?

A. Not to that man, no.

Q. Anybody else that you knew was in the employ of the Atchison, Topeka and Santa Fe?

A. No, I spoke to other fellows but I couldn't get any satisfaction from them.

Q. What time did you get to Lawrence, Kansas?

A. We got in there about half past twelve the next day at noon.

Q. Where did you go when you got in there? What kind of freight did you go on?

A. We went on a local freight that stopped at every station and switched around every station.

Q. You say you got there about twelve the next day?

A. Yes sir.

Q. What did you do when you got there?

A. I went down to see the agent.

Q. Did you find him there?

A. Yes sir.

225 Q. Then what did you do?

A. We asked him what the freight was.

Q. Then what did you do?

A. He sent us to the cashier.

Q. Then what did you do?

A. We asked the cashier what the freight was and he said he didn't know, he didn't have any bill or contract or anything, he said that the conductor on the railroad——

Object to what the conductor —.

Over ruled. Exception taken.

Q. What did he say to you?

A. I asked him what the freight was. He said he didn't know what the freight was, that the conductor that went through the night before on the Red Ball that was supposed to carry us took the bill on through with him and he would have to wait until the conductor came back before he could get the bill and send me what the freight was. He said if we would pay him \$20.00 if there was any difference he would collect it next day.

Defendant moves to strike out testimony as to what the cashier told him the conductor told him.

Overruled. Exception taken.

Q. Mr. Robinson, when did you unload the horses?

A. We unloaded them about one o'clock.

Q. What did you do with them?

A. Took them to a livery barn down town.

Q. Where was it located with reference to the Santa Fe yards where you unloaded them at Lawrence? How far was it from the Santa Fe?

A. I judge about a quarter of a mile, something like that, it was block from the post office.

Q. Now, after you unloaded the horses, what did you do if anything?

A. After we unloaded them?

Q. Yes.

A. We went back then and got a dray wagon and got the trunks and rigging.

26 Q. Did you see the agent at that time?

A. Yes sir.

Q. What condition—did you get the bikes at that time when you sent back?

A. We went back and found the car locked with a padlock.

Q. Then what did you do?

A. We went up to the depot to see what it was locked for.

Q. What did you do if anything?

A. We asked the young man at the cashier's window who the man guy was there and he told us the fellow standing back in the free further.

Q. Then what did you do?

A. I didn't say anything. Mr. Smith talked to him, told him out how the horses were handled, and should be left *left* in the hands of the railroad company the way they were handled.

Q. Did you state anything about where the horses were located?

A. I told him the horses were at the depot and if he wanted to them he could come down and see them if he wanted to.

Q. That was before you unloaded them?

A. That was after we unloaded them.

Q. You told him they were at the livery barn?

A. Yes sir.

Q. Did you have any conversation about how the horses came to delayed and why the red ball freight didn't carry them?

A. Yes, he told me why they were delayed, they were left there by negligence or something like that, he said it was a rank piece of carelessness.

Defendant objects for the reason it is a conclusion.

JUDGE: Part of the testimony as to rank piece of carelessness is excluded.

Q. Did you tell him the horses were injured?

A. Yes sir.

227 Q. You told him where they were?

A. I told him where they were.

Q. Did you see anybody connected with that office that you saw in the office after that time around the barn?

A. I saw a man down there, I don't know whether he was the agent or what he was, down looking over the horses.

Q. Did he say anything which indicated that he was connected with the railroad company?

A. He asked us how the horses were getting along was all that he had to say.

Q. You recognized him as one of the employees in the freight office down there?

A. Yes sir, yes sir.

Q. Did you at any time say anything to anybody else or write to anybody connected with the Atchison, Topeka and Santa Fe Railroad Company in regard to the condition of these horses?

A. Yes.

Q. When?

A. At the same night to a man named Conway, freight claim agent, Kansas City, Missouri.

Q. What did you tell him in the letter?

Objected to by the defendant as not the best evidence.

Sustained. Plaintiff excepts.

Q. What was the purport of the letter about the horses or did you write him a love letter or what?

Objected to by the defendant as not the best evidence.

Sustained. Plaintiff excepts.

Q. Have you got the letter now or a copy of it?

A. No sir, I have not.

Q. Do you know where the letter is?

A. I know where I sent it, I sent it to Kansas City, I don't know where it is now.

228 Q. Did you deposit it in the post office at Lawrence?

A. Yes sir.

Q. What address was on it?

A. Mr. Conway, Freight Claim Agent, Santa Fe Railroad Company, Kansas City, Missouri.

Q. Do you know whether Mr. Conway is living or dead at this time?

Defendant objects as immaterial.

Over ruled. Exception taken.

A. Not of my own personal knowledge, but I have heard he was. I don't know how I heard it, but I am under the impression that he is.

Q. Now, Mr. Robinson I will ask you to state whether you in your letter to Mr. Conway notified him of the condition of these horses?

A. I did, yes sir.

Defendant objects as incompetent, irrelevant and immaterial, not the best evidence, not in compliance with the contract if that's what he is showing it for.

Sustained. Plaintiffs excepts.

Q. Mr. Robinson, were you able to determine the condition of this mare—how long was this mare in your possession after this injury?

A. After the injury?

Q. Yes sir.

A. She was in my possession until about the first of January that winter.

Q. Were you able to ascertain from the condition of this mare after she was injured during the time she was in your possession, whether her injuries were permanent or temporary or the extent of the injuries?

Objected to as immaterial.

Over ruled. Exception taken.

A. Yes sir, I am.

Q. Could you tell in that time whether it was temporary or permanent?

A. Yes sir, I could.

Q. You may tell the jury what your conclusion was?

A. It was permanent.

229 Objected to by the defendant for the reason it is incompetent, irrelevant and immaterial.

Over ruled. Exception taken.

Q. How long after that did you keep the mare in your possession?

A. The first of January I turned it over to Mr. Skaggs.

Q. Did you see the mare at any time after that?

A. Yes, while she was being trained in the spring of 1908 by Mr. Skaggs at Shawnee.

Q. What was her condition then?

A. Well, she was limping when she was going about at the three minute clip, she was lame.

Q. In what way?

A. Her left front leg.

Q. Is that the leg she was injured in?

A. Yes sir.

Q. How long after she was injured were you able to determine whether the injury to that leg was permanent or not?

Defendant objects as repetition, calling for conclusion, question of the fact for the jury, incompetent, irrelevant and immaterial.

Sustained. Exception taken.

Q. Mr. Robinson you may tell the jury, how long did Mr. Moore remain with these horses.

A. Until after the races at Lawrence and then went back to South Dakota, that was about the 23rd or 24th of September, 1907.

Q. What did you do with the horses then?

A. I shipped them to Oklahoma City.

Q. Did Mr. Moore have anything more to do with the horses after that time?

A. No sir, nothing whatever.

Q. Are you able to state to the jury now about how much money Sousa Mc. won prior to her injury?

A. Yes sir.

Q. You may tell how much.

Defendant objects as incompetent, irrelevant and immaterial, not proper in this examination.

Overruled. Exception taken.

A. She had won \$700.00 up to her injuries.

Q. Do you know how many races she was entered in after her injuries, how many engagements she had and what they were?

Objected to as incompetent, immaterial and irrelevant.

Overruled. Exception taken.

A. She was entered ahead at Wichita Kansas; Concordia, Kansas; Dallas Texas; and Fort Worth and she was entered in two races in Oklahoma City she didn't start in.

Defendant moves to strike out testimony of witness as not a proper measure of damage in this case.

Motion overruled. Exception taken.

Q. Do you know what the value of the purse was at Wichita?

Defendant objects.

Overruled. Exception taken.

A. It was \$600.00.

Q. What class of race was it—aged horse or colts?

Defendant objects as incompetent.

Overruled. Exception taken.

A. It was a class for three year old trotters.

Q. What were the class of races and amount of purses at Fort Worth.

Defendant objects as above.

Overruled. Exception taken.

A. They were \$1,000.00.

Q. What classes were they?

A. Three year old trotters.

Q. What were the races and classes at Dallas?

Defendant objects as above.

Overruled. Exception taken.

A. The same amount.

Q. What were the races and classes at Oklahoma City?

231 Defendant objects as above.
Overruled. Exception taken.

A. \$400.00 for three year old trotters.

Q. Was this mare able to fill any of these engagements?

Defendant objects as above.

Overruled. Exception taken.

A. She was unable to fill any of them, she tried to fill one and couldn't make it.

Q. Where was that?

A. Oklahoma City.

Q. What condition was she in at the time she attempted to fill that engagement if you know?

A. Yes sir, her leg was swollen and she was lame.

Q. This leg that was injured—this particular one?

A. Yes sir.

Q. How long after the injury?

A. It was about three weeks. Something like 18 days.

Q. Now, you have no interest in this mare at this time have you Mr. Robinson?

A. No sir.

Q. You have no interest in this suit have you except the interest you have in the racing value of this mare at this time?

Objected to by the defendant as leading, suggestive, not proper issue in this case.

Overruled. Exception taken.

A. All the interest I had was a winning interest, what she was capable of winning.

Q. Do you know how fast those races were trotted at Wichita that she was engaged in?

Objected to by defendant as immaterial.

Overruled. Exception taken.

A. Yes sir. They were trotted in something between 2:26 and 2:30, three heats.

232 Q. How fast if you know were they trotted at Fort Worth, Texas?

Objected to by defendant as above.

Overruled. Exception taken.

A. They were trotted in about the same time by the same horses.

Q. Do you know how fast the races were trotted at Dallas?

Objected to by defendant as above.

Overruled. Exception taken.

A. They were trotted in about 2:23, 2:24 at Dallas.

Q. Could this mare if she had been in good condition at that time, in your opinion, have won these races?

To which the defendant objects for the reason it's calling for a conclusion, incompetent, irrelevant and immaterial.

Sustained. Exception taken.

Q. Mr. Robinson, now you may tell the jury, do you know, basing your opinion upon what you know of this mare, her speed, and conformation are you able to say to the jury, what her market value was, immediately prior to her injuries at Kansas City?

Defendant objects for the reason — tends to vary terms of written contract, incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. Yes sir.

Q. You may tell the jury about what was the market value.

Same objection as above.

Overruled. Exception taken.

A. Well, horses of her class and speed, with the same speed she had, sold all the way from \$2,500.00 to \$3,000.00, \$3,500.00.

Q. Now the question is what was her market value at that time?

A. You mean after she was injured?

Q. Before she was injured, immediately prior to her injuries at Kansas City. You said you knew what her market value was. Now you may state to the jury what that market value was.

A. \$3,000.00.

233 Q. Were you acquainted with the mare from the time she was injured up until the beginning of this trial, were you acquainted with the mare, how long did you see her after these injuries?

A. Up until the 20th of February, a year ago last winter.

Q. Now basing your opinion upon what you know of her condition from the time of her injuries up to the time you saw her last and knew of her, are you able to state what her market value was immediately after she was injured?

A. Yes sir, I am.

Q. What was it?

Objected to by defendant as heretofore.

Overruled. Exception taken.

A. \$300.00.

Q. What would her value consist chiefly in Mr. Robinson?

Defendant objects as not proper measure of damages.

Overruled. Exception taken.

A. She would only be valuable as a brood mare or for common roadaring purposes.

Q. That is in her injured condition?

A. Yes sir.

Q. What would her value consist of chiefly in her uninjured condition.

Defendant objects as above.

Overruled. Exception taken.

A. Her value would be as a racing mare and her ability for winning money in races.

Q. Mr. Robinson did you start this mare at Lawrence Kansas?

A. Yes sir.

Q. Just tell the jury how she performed in that race and what condition she was in?

A. When we started her there her leg was swollen below the knees; her left front leg, and she was lame and refused to trot and was distanced, that is she got the flag, was behind the flag and 234 had to go to the barn.

Q. What did you do to make her stay up on that leg?

A. Well, I used hot application and cooling lotions to take the fever out and used a drug to deaden the nerve during the race.

Q. What did you use?

A. Ether and laudanum.

Q. How fast was that race trotted?

A. About 2:35.

Q. Do you know whether she had been in the race with the horses that won that race and other horses that competed in it prior to that time?

A. Yes sir, she defeated them at Topeka, Kansas.

Cross examination by Mr. GREEN:

Q. Where do you live now?

A. Oklahoma City.

Q. What's your business?

A. Training and handling race horses.

Q. What is your place of business there.

A. The State Fair Grounds.

Q. How many horses have you now?

A. I have four horses in training.

Q. Own them or work them for others?

A. Working them for wages.

Q. You don't own the horses?

A. No sir.

Q. By whom are you employed?

A. By Mr. Hoover, working three horses for Mr. Hoover from Tennessee and one for Mr. Young from Shawnee.

Q. How long did you work on the Running Mead Farm?

A. Seven years at different times, about four years put it all together.

Q. Did you work for wages there?

A. Yes sir, by the month, on a salary.

Q. Was this the Mr. Smith that was interested in that 235 farm?

A. Yes sir.

Q. Mr. H. H. Smith here?

A. Yes sir.

Q. Who is the attorney in this case?

A. Yes sir.

Q. Do you know what interest if any he had in the farm?

A. I know nothing about what interest he had, I don't know as he had any interest, he was one of the managers.

Q. His brother S. H. Smith is the man with the Interstate Commerce Commission?

A. Yes sir.

Q. Did Mr. H. H. Smith have any interest in these horses in question here?

A. No sir.

Q. What time of the year did you leave Armour on this racing circuit that you and Mr. Moore went on?

A. You mean when we first left?

Q. Yes.

A. About the first of June.

Q. How did you ship your horses? and on what line?

A. Over the Milwaukee part of the time and over the Soo line.

Q. By freight?

A. Yes sir.

Q. How many horses did you ship first out of there?

A. Five.

Q. Where to?

A. Courtland.

Q. And raced them there?

A. Yes sir.

Q. Then where did you ship?

A. To Carrington.

Q. What line did you ship on?

236 A. The Soo line.

Q. By freight?

A. Yes.

Q. Where did you ship from there?

A. To New Rockford.

Q. By freight?

A. Yes sir.

Q. Have these same five horses?

A. Yes sir.

Q. Where did you ship from New Rockford?

A. To Valley City.

Q. Then where did you ship?

A. We shipped from Valley City to Kensem.

Q. Over what line did you ship to Kensem?

A. Over the Great Northern.

Q. The same five horses?

A. Yes sir.

Q. Then where did you ship from Kensem?

A. From Kensem to Fessenden.

Q. Over what line?

A. It was either the Soo or the North Western.

Q. Then where did you ship?

A. To Harvey.

Q. Over what line did you ship into Harvey?

A. I cannot remember.

Q. Where did you ship from Harvey?

A. To Armour, South Dakota.

Q. What time did you get back to Armour?

A. Back to Armour?

Q. Yes sir.

June. A. Well, we raced up there nine weeks and we left on the first of

Q. It was nine weeks until you returned?

A. That would be the third week in July.

237 Q. How long did you remain at Armour?

A. I remained up there until the 8th of September.

Q. Where did you go from there?

A. I shipped four horses to Kansas City.

Q. And you met Moore there with this mare he had shipped out, then, if you know from Armour.

A. He didn't stay in Armour over a week.

A. He didn't keep Nancy there over a week until he shipped to Manhattan?

A. He shipped Sousa Me to Manhattan.

Q. Where did he race her after he left Armour until you met him in Kansas City?

A. Clay Center, Topeka, those two places I know, I know those two.

Q. You met him in Kansas City about the 15th of September?

A. Somewhere along there, yes sir.

Q. Where did you keep your horses in Kansas City?

A. At the Elm Ridge race track.

Q. When did you move them down to the depot or near there?

A. What time of day?

Q. Yes.

A. We moved them about, to the Hunter Transfer barn, about 2 o'clock.

Q. You say you ordered a car?

A. Yes sir.

Q. Who did you order that car from?

A. Well I rang up from the Elm Ridge race track and called for the agent, I suppose he answered the phone.

Q. What did he tell you?

A. He told me to have the horses there and there would be a car ready at four.

Q. You don't know who was at the other end of the telephone?

A. No, he said he was the agent, I don't know.

Q. What time of the day was that?

A. That was at noon, just before I started with the horses.

238 Q. When was it you had the conversation with the agent in his office?

A. Well, I had two or three conversations with him, one when I first got down there, with the horses.

Q. What time was that?

A. About two. And I had one about three, and I was in the office there several times along all the afternoon.

Q. Where was that office?

A. That was in the freight office of the Atchison, Topeka and Santa Fe.

Q. Upstairs or downstairs?

A. I cannot say positively, it seems to me like I went up a small flight of stairs.

Q. Did you go into the office?

A. I talked with him right over the counter.

Q. When did you make your arrangements about shipping—getting your contract?

A. Why, that was after we had loaded the horses I would judge about eight o'clock.

Q. Is that the same man you talked with?

A. Yes sir.

Q. That was the same man?

A. The same man didn't write out the contract, he turned me over to the bill clerk.

Q. But the same man was there in the evening at eight when you got your contract that you had this conversation with about shipping the horses?

A. I wouldn't say for sure he was there when I got the contract, he was there about half an hour before I got it.

Q. Was he in the same office there with the man who gave you the contract and where you signed the contract?

A. He was in that office when I talked with him.

Q. In that same room there?

A. Yes.

Q. And behind the same counter?

239 A. Yes, he was behind the counter.

Plaintiff objects to answer for the reason it is incompetent, irrelevant and immaterial, not proper cross examination, no such question asked witness in this regard and for the further reason under the pleadings in this case the contract pleaded is insufficient and no defense in law.

Overruled. Exception taken.

Q. Now then all of these conversations took place there in the same office building or the same room, were they?

A. Well, I was talking to the chief clerk upstairs.

Q. You talked with the chief clerk upstairs?

A. Yes sir.

Q. When did you talk with him?

A. In the afternoon.

Q. Was that the same clerk that signed this contract with you?

A. Oh no, this was the chief clerk, it was a different department altogether.

Q. What did you talk with him about?

A. I went up to talk with him about ordering the car and about when it would be spotted and one thing and another.

Q. Is he the same man as the agent?

A. No.

Q. Do you know what that agent's name is?

A. No sir.

Q. Where is his office there?

A. No, I was telling you just where I talked with him, I couldn't tell where his office was, it's awful hard to get any information out of the railroad company.

Q. What looking man was he?

A. I cannot say, it's been three years.

Q. Was he large or small?

A. It seems to me he was a medium sized man?

240 Q. Was he dark or fair?

A. I couldn't say.

Q. Do you know whether he was the agent of the company or not?

A. He said he was.

Objected to by plaintiff as above.

Overruled. Exception taken.

Did you have any conversation with the chief clerk at the you signed the contract?

No sir.

With the party that you signed the contract with, did you have conversation?

A. The bill Clerk?

Q. Yes sir.

A. Yes, I asked him about when that through freight was going and he told me it would be about nine o'clock.

That was at the time you got the contract about eight in the g?

A. Yes sir.

Q. As soon as you got the horses loaded you went right to his office and got the contract?

A. No sir.

Q. What did you do?

A. I went after the contract about eight o'clock. I went up there as soon as I got the horses loaded and he was not ready and told me to come back after while and get the contract.

Q. Now, those horses were shipped in Mr. Moore's name?

A. Yes sir.

Q. Why were they shipped in his name?

A. Because he was supposed to go with them.

Q. He was in charge of the shipment?

A. I was in charge of it as much as he was.

Q. But they were shipped in his name?

A. I didn't know for sure whether I would be there when 241 the horses got there or not, so he could get them off, was the reason they were shipped in his name.

Q. You usually got a contract of shipment in moving your horses?

A. As a rule, sometimes we did and sometimes we didn't.

Q. Up there in North Dakota you usually had a contract of shipment?

A. Yes, as a rule.

Q. What time was your car moved from the *darick* track?

A. It was moved about half past nine, something like that.

Q. How far did they move it?

A. I cannot say, it was dark you know and I was in the car, they must have moved it twenty miles that night around the yards.

Q. I mean how far in which direction did they move it from there before they stopped?

A. I am kind of turned around in the town, I don't know which is north and which is south but they moved it away towards Argentine.

Q. You remained there sometime did you before they removed you to Argentine?

A. We didn't remain at all, we were on the move continuously.

Q. But in around there in the yard, it's quite a distance from Kansas City to Argentine?

A. Oh, it's about four miles, something like that.

Q. How far were you from Argentine?

A. When we were in the yards?

Q. Yes. Were you in the Kansas City yards or the Argentine yards?

A. We were in both yards.

Q. You were in the Kansas City yards before they took you over to Argentine?

A. Yes sir.

Q. Is that where you say the horses were knocked down?

A. They were knocked down in both yards.

Q. You knew the horses were injured did you?

A. Yes sir.

242 Q. You knew they were injured at Kansas City or Argentine?

A. I never examined their injuries until we got out of Argentine. I knew they were injured but I didn't know how bad or in what way until I got out of Argentine, I took the bandages off of them.

Q. You had the car bedded with straw?

A. Yes sir.

Q. You discovered before you got to Lawrence that the horses were injured, both of them?

A. Yes sir.

Q. What time did you get into Lawrence?

A. We got in there between twelve and one o'clock next day.

Q. Where did you unload the horses?

A. At the freight depot platform.

Q. Where did you take the horses?

A. To a livery barn up town.

Q. How long did you leave them in the livery barn?

A. Left them there during the whole meeting but we took them to the race track to a stall during the day we raced.

Q. What day did you race with reference to the day you got in Lawrence?

A. We got there Tuesday and it seems to me we raced—I don't know whether it was Wednesday or Thursday.

Q. Did you attempt to race more than one heat?

A. Yes, we tried to race two heats but one heat was all we could race. We raced one heat and tried to race another.

Q. Did you come out second or third in one race?

A. No sir, I don't remember where she did finish, I knew we weren't going to draw anything.

Q. Who drove her?

A. Mr. Smith.

Q. When you got into Lawrence you say you went to the depot—who did you talk with there?

A. Yes sir, I spoke to the agent.

Q. Do you know what kind of looking man the agent was?

243 A. No sir, I do not remember, I have seen so many agents.

Q. Was he young or old?

A. I cannot say.

Q. Did you serve any written notice on him of any claim for injuries to these horses at that time?

A. On the Agent?

Q. Yes sir.

A. Not a written notice on the agent.

Q. You talked with the chief clerk you say?

A. At where?

Q. At Lawrence.

244 A. Well I don't know, I talked with the main guy—that is I suppose it was.

Q. Did you take any receipt for your freight?

A. I didn't no.

Q. Who did?

A. Well now, I cannot say who did.

Q. Did anyone?

A. They must have if they paid the freight if they gave them a receipt.

Q. Have you that receipt?

A. No sir.

Q. That receipt would show the freight you paid?

A. Yes sir, it would I reckon.

Q. You haven't got it with you?

A. No sir.

Q. Do you know who has it?

A. No sir.

Q. Did you sign any freight receipt?

A. No sir I never signed any receipts there myself at all.

Q. And didn't get any?

A. No I didn't, no.

Q. Do you know just how much the freight charges were on this shipment?

244 A. Yes sir.

Q. How much?

A. \$20.00 besides the \$2.60 they collected afterwards.

Q. Do you know who paid the \$2.60?

A. Yes sir.

Q. Who?

A. Mr. H. H. Smith.

Q. Did he take any receipt?

A. Yes sir.

Q. He did?

A. Yes sir.

Q. Do you know his signature?

A. Yes sir.

Q. Is that his signature?

A. Yes sir.

A. That's Mr. Moore's name.

Q. By whom is it signed?

A. Mr. Smith.

Mr. SMITH: The objection of plaintiff goes to all these questions upon the cross examination without making objection every time and taking the time of the court.

Q. Mr. Robinson how long did you stay in Lawrence?

A. We were there about a week.

Q. About a week. During that time did you see the agent afterwards after you arrived there with your horses?

A. I seen him at the livery barn I believe.

Q. When did you see him at the livery barn?

A. The next day, or a day or two after we got there.

Q. What was his name—do you know?

A. No sir.

Q. You cannot describe him?

A. No, I can't now, I could then.

Q. You don't know whether he was an old or young man?

A. I don't remember anything about him; I see so many agents shipping around I would get him mixed up with some other agent I presume if I tried to describe him.

Q. How many persons did you talk with employed by the railroad company at Lawrence?

A. I talked with three during the time I was there.

Q. What did you do with your contract of shipment in this case?

A. I don't remember.

Plaintiff objects as incompetent, irrelevant, immaterial, not proper cross examination; it has not been shown he had any contract.

Overruled. Exception taken.

Q. You and Mr. Moore both rode in the car together did you?

A. Yes sir.

Q. You signed the contract of shipment upon which these horses moved?

A. Yes sir.

Q. Signed Mr. Moore's name?

A. Yes sir.

Q. He authorized you to sign it?

A. Yes sir.

Q. The arrangement you had with Mr. Smith relative to racing these horses was that with Mr. H. H. Smith or Mr. S. H. Smith?

A. Which horses do you mean?

Q. This horse?

A. That was Mr. S. H. Smith.

Q. He was the one in Washington?

A. Yes sir.

Q. Where did you have that arrangement with him?

A. At Armour, South Dakota, at Running Mead Stock Farm.

Q. Was that in writing or verbal?

A. In writing.

Q. Have you a copy of that writing?

A. Not here, I have not.

Plaintiff objects now as to testimony of witness in reference
246 to arrangement of handling of these horses for the reason
shown in testimony it is in writing and not the best evidence.
Overruled. Exception taken.

Q. Mr. Robinson when you say that you talked with the agent at Kansas City, wish you would state just what you said to him.

A. What I said to the gentleman?

Q. Yes sir.

A. Why, I just spoke to him about getting out on this fast freight you know so the horses would not be bumped around in the yard by switching and on the way over there by local freight and I told him I wouldn't ship them under any consideration on any other kind of a freight because I wouldn't get there in any shape.

Q. Just use the language that was said between you.

A. Well, I don't remember what he said only he said we could go on this through freight and they plastered the Red Ball tag on us, on our car about 8 o'clock.

Q. Well what did you say to the agent?

A. I told him just what I said, I wanted to go on a through freight and wouldn't go on any other kind of a freight.

Q. That's all you said to him is it?

A. That's the main thing I talked about, getting out on this through freight.

Q. Have you given to us all the conversation and just what he said to you?

A. Well, I have given you the most of it, I said whole lots more to him of course but that's the main point.

Objected to as repetition, incompetent, irrelevant and immaterial.
Overruled. Exception taken.

Q. Was that before or after you loaded the horses?

A. That was before and after both, I spoke to him about it several times.

Q. Who did you talk with after you loaded?

A. The bill clerk when I billed out.

247 Redirect examination by Mr. SMITH:

Q. Mr. Robinson did the billing clerk say anything to you about Mr. Moore signing the contract when he brought it to you?

A. He said the contract is ready and I said Mr. Moore is in the car and he said I could sign as well as Mr. Moore and I had this authority to use his signature if I wanted to and I signed it.

Q. Did he say anything about giving you any reduced rate or about valuing the mare at \$100.00?

Objected to by defendant.

Overruled. Exception taken.

A. He said nothing about a reduced rate or about the value of the mare.

Q. Did you ask him anything about giving you a reduced rate.

Objected to by defendant.

Overruled. Exception taken.

A. I never asked him for any reduced rate.

Q. Did he call your attention — any part of the contract when you signed it with reference to reduced rate or limited valuation of any kind.

Objected to by defendant as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. No sir, he did not.

Q. Did the billing clerk or the agent or the chief clerk or any of the parties you talked with about this shipment see these horses at any time prior to the loading of them?

A. Yes sir.

Q. Who was it?

A. There was a man on the platform who had charge of loading the freight.

Q. Did he see them?

A. He saw the horses—saw us load them.

Q. Did you tell the agent they were race horses?

Objected to by defendant as leading and suggestive.

Sustained. Exception taken.

Q. Did you have any conversation with the agent about 248 what kind of horses these were?

Objected to as repetition.

Overruled. Exception taken.

A. Yes sir.

Q. What was it?

A. I told him what kind of horses they were—told him they were race horses, that I was going to the races with them, I wanted to get there in time and in good shape, wanted to go on a good train, a fast train that made no stops, and made arrangements for them to go on the through freight called the Red Ball.

A. Any time prior to the time you signed this contract or any time after you signed it previous to the time you shipped the horses out of Kansas City did the billing clerk or agent or chief clerk call your attention to the posting of any rates around there?

Objected to as incompetent, irrelevant and immaterial.
Overruled. Exception taken.

A. No sir, they did not.

Q. Did you see any posted rates around there in any of these buildings?

Objected to as above.

Overruled. Exception taken.

A. No sir, I did not.

Recross-examination by Mr. GREEN:

Q. Did you ask to see any?

A. No sir.

Q. You didn't make any inquiry did you?

A. About what?

Q. Any rates?

A. I never asked him what the rates were, I was going to ask at the other end, we always paid at the other end.

Q. You didn't ask him anything about shipment of it did 249 you?

A. No sir, I didn't ask him for any reduced rate.

Q. You can read?

A. Yes sir.

Q. Had an opportunity to read this contract?

A. Not before it was signed, no.

Q. Why?

A. Because, the billing clerk in putting it out for me to sign, holds it down there, there is four or five places to sign and he takes the bill in his fingers and says "sign here" and turns it over and says "sign here" and I knew I had to sign a bill in order to get the horses shipped.

Q. It didn't make any difference to you what you signed?

A. Yes it did make a difference to me what I signed.

Q. Did you ask him to let you read it?

A. No sir, I didn't.

Q. You say the only one who saw these horses was the one at the dray track and the yard master?

A. I said they saw them—I didn't say they were the only ones.

Q. Did you show them to this agent, clerk at the time you made the contract?

A. There were three men there, one besides the man who loaded freight and the yard master.

Q. But neither the agent nor this clerk?

A. I don't know who they were.

Q. They were just working around there were they?

A. The man working there was the man loading the freight.

Q. He had charge of the platform?

A. Yes sir.

H. H. SMITH being duly sworn as a witness in behalf of
250 the plaintiffs testifies as follows on direct examination by
Geo. B. Rittenhouse.

Q. State your name.

A. H. H. Smith.

Q. What is your occupation Mr. Smith?

A. Attorney at law.

Q. Where do you live at this time?

A. Shawnee, Oklahoma.

Q. Where were you residing in September of 1907?

A. Well, I had moved to Oklahoma City at that time but still
had a part of my business at Armour, South Dakota.

Q. What business were you engaged in at Armour, South Dakota?

A. Well, my brother and I owned the first National Bank at
Armour and the Running Mead Stock Farm and I was practicing law
up to—well the first of January of that year.

Q. How long had you resided in Armour, South Dakota?

A. I lived there from 1900 to 1907. Prior to that time at Sioux
Falls.

Q. What experience have you had as breeder, owner, and trainer
of trotting horses?

A. Well, my father and my brother and I were in the trotting
horse business in Kentucky under the firm name of M. Smith &
Sons, Running Mead Stock Farm, ever since I was 17 or 18 years
old, 18 years old I think, and after 1897, about that time, the Running
Mead Stock Farm at that point was closed out and part of the
horses shipped to South Dakota and after my father's death in 1906
why the farm was controlled by my brother and myself. While
I was at the farm in Kentucky my brother and I trained most of the
horses at the farm before I commenced practicing law. Since I
have been practicing I have always owned some race horses and
raced some horses and sold a good many; some years 40 or 50
251 and some years not over 15 or 20. Principally trotting
horses and pacing horses.

Q. From your experience in buying and selling trotting horses
do you know the value generally of trotting horses?

A. Yes sir, I think so. I have sold horses at pretty nearly every
auction market in the United States. There are not a great many
auction markets for trotting horses, six or seven.

Q. How many horses have you bought and sold during the time
you have been in the business?

A. Since I have been in the business for myself, I don't know,
probably, I have bought a good many horses that never were trained,
probably have bought and sold myself and at the farm we have
bought and sold probably four or five thousand horses in that time,
I wouldn't attempt to be accurate, I don't know.

Q. Do you know the horse Sousa Mc in controversy in this action?

A. Yes sir.

Q. Did you own Sousa Mc or any interest in her?

A. Well Sousa Mc was owned by the Running Mead Stock Farm in which I had an interest and at the death of my father, why his interest in the Running Mead Stock Farm was taken by the First National Bank of Armour.

Q. You were a stockholder in that bank?

A. Yes sir, and my father was a stockholder too.

Q. And Sousa Mc was the property of the First National Bank?

A. Yes, at one time and in a sale of the horses between my brother and myself he took this mare Sousa Mc.

Q. Been his property ever since?

A. Yes sir. Along in the winter of 1906-1907 she became his property.

Q. What kind of an animal was Sousa Mc as to breed?

A. Well she was sired by the principal farm stallion Mc Roberts. Mc Roberts was a horse that we had at the farm for seventeen or 252 eighteen years at this time. He is the sire of something like thirty-eight or forty of the records of 2:40 and by Robert McGregor. And her dam was also by him. She was an inbred mare. Her dam was a mare we had called Luceetta. Luceetta was a full sister of Robert Mack who had a record of 2:08 1/2. The second dam was by Hester Wilkes. The third dam was by the Duke of Brunswick; the fourth dam was by Little Dick and the fifth dam was by a thoroughbred horse called Imported Knight of St. George.

Q. When was the training of Sousa Mc commenced?

A. My recollection is sometime, she was broken in the winter or fall of 1906. Her actual training began about the first of April or May. I believe it was an early season that year and her actual training began about the first of April, she had only been trained about sixty days when we sent her away to the races.

Q. What was her earnings for the year 1907 if you know?

Defendant objects as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. I don't know what all of her earnings were. I know what she won in some races.

Q. State what they were and what she won?

Defendant objects as above.

Overruled. Exception taken.

A. I saw her in one race in North Dakota, Courtney, where she won second money, I never saw her race anywhere else except Lawrence.

Q. What was her winning in that race you saw in Dakota and what was her time?

A. I think the purse was \$400.00 and she won second money which was \$100.00.

Q. What was the time?

A. 2.24 $\frac{1}{4}$, the winner, she was *wight* up within one-fourth of a second or probably a length of the winner.

253 Q. Was that on a fair track?

A. That was on a half a mile track.

Q. Do you know what that would have been on a mile track?

Objected to by defendant as incompetent, irrelevant and immaterial, calling for a conclusion.

Overruled. Exception taken.

A. Well the difference between that particular track and a good mile track would be, to a horse like her, gaited like she was, would be six seconds at least, five or six seconds, the average difference between a mile and half a mile track, providing the footing is in the same condition, is about four and one-half seconds or five, nobody can tell exactly it varies with the gait of the horses. Some horses can get around the turns faster and others can't they have to slack up at the turns.

Q. You have seen this horse several times—if you can, give a description of her.

A. Well, she was a medium sized black mare, rather stout build, and of a great deal of finish; she would weigh about 900 pounds, and when she went slow she paced; when she stepped up she trotted altogether, she didn't wear anything much except harness; an even tempered mare; a good race mare; a speedy mare; could trot a good many heats for a mare of her training. She was above the average in staying qualities stamina.

Q. As an owner in the First National Bank did you have anything to do with the transfer of this animal?

A. Yes sir.

Q. Explain it.

A. Transferred her, charged to the account of the S. H. Smith—for the mare at \$1,800.00 and I took some other horse and they were charged to me, that was the way she became his property.

Q. That was prior to the training had of her?

254 A. Yes sir, that was a settlement of the Running Mead

Stock Farm affairs, between by brother and myself and a division of the interests of my father; of our interests in my father's estate and my mother's interest, that was how he came by this horse.

Q. That represented at the time the entire value of the horse?

A. Yes sir. I don't think however, this valuation on this mare was fixed nor the sale of her completed until along about June; I don't think this final disposition of the mare, the value of any of the horses I got or he got, was fixed until in June. The horses were divided at that time, however, in the winter, the valuation to be fixed afterwards because some of them we didn't know much about what they were worth, they hadn't been tried. That is the horses in training. The horses not in training were sold in November before that time and the brood mares remaining on the farm were divided and at a later time sold.

Q. Who was training Sousa Mc at that time or just subsequent to that?

A. Mr. Moore and Mr. Robinson were both working at the farm and were training these horses.

Q. Who was driving the horse at the time you saw it perform in South Dakota?

A. Well I saw her at Armour perform a good many times. Mr. Moore usually drove this mare, if I went to any of the races where she was going to race I generally drove some of them for the fun of it. I drove this mare myself at Courtland, North Dakota.

Q. When was the next time you saw Sousa Mc perform?

A. I saw her work a mile at Armour after she came back from North Dakota. Mr. Moore drove her—what we call regular work out, three or four heats.

Q. What was her condition at that time?

A. She was not in first class racing condition, but fairly good condition, not in condition to trot her limit.

255 Q. Was that after she had campaigned the season of 1907 in Dakota?

A. Yes sir.

Q. Where next did you see her perform?

A. The next time I saw her perform was at Kansas City two or three days before she was shipped out, I think probably on Saturday.

Q. Do you know in what condition she was?

A. I came to Kansas City Saturday, I don't recollect whether I saw her perform or not, I went out to the track.

Q. What year was that in?

A. 1907.

Q. What month?

A. It was in September. My recollection is about the fifteenth.

Q. What condition was she in at that time as to being sound or otherwise?

A. Well she was sound, and in just fairly good racing condition, better than when I saw her at Armour. She could trot a faster and better race.

Q. Do you know what her time was at Kansas City in September, 1907?

A. I tried her a mile there in about 18, 17 $\frac{3}{4}$ I think.

Q. You mean by that.

A. A mile in 2:17 $\frac{3}{4}$; she trotted the last half in 1:07 or something like that.

Q. Did you enter her in any races at that time?

A. Yes sir, I entered her, I believe, at Wichita.

Defendant objects to this part of the testimony as to where she was entered.

Overruled. Exception taken.

A. My recollection is I entered her at Wichita in the three year old trot, and at Oklahoma City in the three year old trot and the

256 2:29 trot aged horses; and at Ft. Worth in the three year old trot and the 25 trot, and at Dallas in the three year old trot and the 2:28 trot; the 28 trot and the 25 trot were for aged horses.

Q. At what age was Sousa Me at this time?

A. She was a three year old.

Q. Now did she perform in any of these races?

A. No sir, not in any except one at Oklahoma City.

Q. What was the reason?

A. Well, she was lame most all the time. I saw her at Oklahoma City a few times and at Lawrence, Kansas; however, I saw her race at Lawrence before Oklahoma City and I saw her at Oklahoma City, and three or four weeks after that, prior to the race and the day she started in the race which was a three year old race. She was quite lame and the track was muddy.

Q. Was this after she had been shipped from Kansas City to Lawrence?

A. Yes sir.

Q. What was her condition at Oklahoma City after she had been shipped from Lawrence to Oklahoma City?

A. I didn't see her for ten days after she was shipped from Lawrence but when I did see her left leg was swollen below the knee, more on the inside than on the outside, and I saw her before she started in that race, in fact I cochained her leg myself, to make her stay up.

Q. What position did she finish in at Oklahoma City?

A. Well, she finished second two heats and the last heat I think she was last or fifth, she got second money out of that race however, finished second the first two heats and was away back the last heat.

Q. Since that time was she able to be started in any of these other races she entered?

A. No sir, after this race she was quite lame and no attempt was made to race her.

Q. On account of this lameness?

A. Yes sir.

257 Q. Do you know what the purse was for these different entries that she was entered to race in?

Objected to by the defendant as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. Yes sir.

Q. State.

A. My recollection is the purse at Wichita was \$800.00. The purse at Oklahoma City, three year olds was \$350.00 and 29 trot was \$500.00. The purse at Fort Worth and Dallas according to my recollection was \$1000.00.

Defendant moves to strike out all testimony of witness for reason it is incompetent, irrelevant and immaterial, speculative, and conjectures.

Objection overruled. Exception taken.

A. I will say I made the entries on the entry books.

Q. At the time you shipped from Kansas to Lawrence what road did you ship over?

A. Over the Atchison, Topeka and Santa Fe.

Q. Who made the arrangements with the company for that shipment?

A. Well, I called the office up, the freight office, from the Baltimore Hotel in the morning and then went out to the track and then Mr. Robinson and I went to the telephone and called up the freight office and he talked to them; my recollection is he talked to them from the track, but I talked to them from the Baltimore Hotel in the morning.

Q. State what that conversation was?

A. Well I told them—

Defendant objects as incompetent, irrelevant and immaterial tending to vary terms of written contract.

Overruled. Exception taken.

A. I called, I think for the agent and they gave me the 258 chief clerk's is my recollection and somebody answered and said the chief clerk was not there but he answered in his place and my conversation was with him, and I think he said he was the next man to the Chief Clerk or something. I told him I had two horses myself out at the track and there were two other horses we wanted to ship to Lawrence to the races and we would like to know if we could get on a fast freight so as not to be delayed around the yards and get to Lawrence quickly, that is in two or three hours. He told me we would get out of there at ten o'clock on a freight called the Red Ball, and probably be on the road two hours, not exceeding three hours anyway. I told him we wanted to ship those horses there to the races. I don't recollect what he said. I think he said he didn't know what time we would have to load and to call them up later—I am pretty sure that's why we called them up again.

Q. That's the conversation Robinson had from the track?

A. Yes.

Q. Then what did you do relative to shipping these horses?

A. They left the track a little before noon of the next morning—maybe it was the morning we telephoned—I am not certain about that—I believe it was the morning we telephoned—the horses left the track about eleven o'clock, as I near as I recollect. I came in on a car and they rode them in.

Q. They came in the freight depot about what time of day?

A. I didn't see the horses anymore until evening—just before they loaded them—I went down when they loaded them.

Q. You saw the car they were put in?

A. Yes sir.

Q. Was it marked with any sign which indicated what train it was to go on?

A. I didn't notice; my recollection is it was a furniture car. It might not have been a furniture car, but a rather big box car.

Q. You were there when the horses were put in the car were you?

259 A. I don't think so, right when they were put in, I believe I was over, I left right after they were put in the car.

Q. Do you know the physical condition of Sousa Me at the time she was placed in that car?

A. Well, I saw her at the track before and I saw her there of course but her legs were bandaged.

Q. She was not lame at that time?

A. No sir, I didn't notice it. I don't think she was lame. They were down at the livery barn about a block from there and were led out of there and taken up toward the car. I saw them lead out.

Q. She was not limping at that time?

A. No sir.

Q. Did you go to the freight house at the time this contract was signed?

A. I don't know when any contract was signed. I was up there once or twice to inquire about when they would go out and about the shipping or anything. I talked to the Chief Clerk, I don't think I ever saw the Agent I talked to the chief clerk once myself—that is I took him to be the chief clerk.

Q. What did he say to you?

A. It was upstairs somewhere where there looked to be twenty-five or thirty people working. He said there was not any doubt but what they would get them out of there at nine or ten o'clock. The Red Ball freight was a fast freight and didn't make any stops except certain places, I believe he read one place before we got to Lawrence.

Q. Did he tell you what train this car was to be shipped on?

Objected to by defendant as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. He said it was to be shipped on that Red Ball freight.

Q. Was it shipped on the Red Ball freight?

Defendant objects as the competency of the witness is not shown.

Overruled. Exception taken.

A. I went to Lawrence and the Chief Clerk there or cashier told me they were not; that they hadn't, that they would be there on a local freight. I didn't see them when they got there.

Q. Chief Clerk of the Atchison, Topeka and Santa Fe?

A. At Lawrence. He was chief clerk or cashier there, there were three or four there and I talked to two or three of them. I was there a couple of times. I went up to Lawrence that night and went down with Mr. Dunkle in an automobile a couple of times to inquire about whether they were there or not and that's when I had part of the conversation when I knew they were not there at that time.

Q. The red ball freight was there at that time?

A. Yes sir.

Defendant objects.

Overruled. Exception taken.

A. One of the clerks when I went in there told me they didn't come on the Red Ball freight. He told me they were mislaid in the yards and would come up on a local freight and get there about twelve or one o'clock.

Q. What time did they get there?

A. About twelve or a few minutes before, somewhere along there.

Q. Who paid the freight to Lawrence on this car of horses if you know?

A. Well, sir, I am pretty certain I paid the freight, I went in the freight office there. I gave Mr. Moore the money to pay the freight but I don't think he paid it and Mr. Robinson and I went in there and he went down to the car to unload the bikes and we went in the freight office and I am pretty certain now I paid the freight there: I know I asked the cashier what the freight was and he said he didn't know; he didn't have any bill; if they were shipped by local freight or by car load the freight would be different and he 261 said the bikes had been inspected by somebody there in the freight yard and there would be some extra freight on them and I asked him about how much. I believe he said the inspector had caught the car of stuff out there and there would be some extra freight on them probably.

Recess of five minutes taken and jury admonished.

Parties and jury present as heretofore trial of cause is continued.

Q. Did you have any other conversation at that time with any other agents or employees of the Santa Fe?

A. Well, right at that time, I don't think I did, I talked to these I did have some conversation while in there at that time with the gentleman who sat up in this end of the room, that building was about this long and narrow and had windows along the front of it and the cashier's office was down here and this other gentleman sat up here, and I think I said to him, I will give you \$20.00—I will pay so much money, I don't recollect what it was, it appears to me I gave him \$20.00, it seemed that way to me, and whether he gave me back any change or not I do not know, but I think he kept the \$20.00 and told me if there was any difference when he got the contract he would give me back the difference and another young man afterwards came out to the track, the day this mare raced, I think the next day, Sousa Mc, after we had this conversation, it might have been two days, and he collected two dollars and something from me, probably it was \$2.60, somewhere along there, he said he had the freight bill and I think I—I don't know whether he gave me any paper then or not—I don't know whether—sometimes I signed Mr. Moore's name, I don't know whether it was when I was down there or when I was out at the track. It kind of seems to me it was when I was down there we talked about it and he said—I think I refused first to sign it and then I said well, it don't cut any figure in this case, I will sign it, whenever I signed it 262 I signed Mr. Moore's name to it, that's my writing on there anyway, I had forgotten I ever signed a paper of that kind but I probably did—that's my writing.

Q. Did they at that time, any of the employees or agent of the Santa Fe state why they didn't know what the freight was at that time?

To which defendant objects as leading and suggestive.
Over ruled. Exception taken.

A. Why the gentleman who sat up in the end, Mr. Robinson was talking to him while I was paying the freight, talking to the cashier, whatever I was doing there, about getting the car open, the conversation come about and he said something about having a pad lock on the car and that was the way the conversation commenced, about the cashier, I commenced the conversation up here and he said go down there and I went down and talked to the cashier and Mr. Robinson remained talking to this other gentleman up there is my recollection. I don't know as I know who he was I don't know as I should recollect him if I saw him but anyhow he said in the conversation—I joined Mr. Robinson after I got through with the cashier—and he said, "the horses were mislaid in the yards and should have come up on the Red Ball freight, am very sorry." He was very pleasant about it, hoped there was nothing serious. I think I told him the horses' legs were swollen; we couldn't tell anything about it till after a certain length of time; till the fever would go out, but I was satisfied they would be in no condition to race there. That was about all the conversation I had with him except I told him the horses were up there at the livery barn, told him whose and now I have forgotten, I think it was the young man who collected the freight of me at the back, that came to this barn prior to this time, they dropped in while I was sitting there and asked how the horses were or something of that kind, looked at them and asked me which if any of them were going to race and I think I told him we were going to try to race the

263 pacing horse Don Extallion and the black mare. Don Ex Tallion was not injured very much and I thought he might race. Don Ex Tallion and the other trotting horse belonged to me.

Q. Did you race Sousa Mc at that time?

A. Yes we started her in the three year old trot.

Q. How did she finish?

A. Well, she made half a dozen brakes the first heat; that is she quit trotting and ran, and finished fourth, and I think the next heat she was distanced—it might have been the third heat, but I think the second heat she made three or four breaks till she got up near the three-quarter pole and then she made a break going around the turn and then run a couple of hundred yards probably, and then stopped still.

Q. Do you know what caused her to break?

A. And then she walked from there in. She was distanced and sent to the barn. She was lame—very lame.

Q. Did you examine Sousa Mc immediately after she was taken from this car?

A. Well, in the course of an hour I did.

Q. What was her condition at that time?

A. Her leg was swollen round about; she had quite a small leg, her leg was swollen to about that size under the knee and swollen clear down to the joint here, swollen *in* both sides, but the principal swelling seemed to be on the inside under the knee, seemed to be very sensitive there and she was lame when she walked.

Q. You were not present at the time the car went from Kansas City to Lawrence?

A. No I went back up town about the time the horses were loaded. I don't believe I saw them loaded, I was probably talking to somebody, but I know we went right down to a little place after they were loaded and got a lunch.

264 Q. Now, from your experience with horses can you say as to whether or not the injuries received by this horse at that time are permanent or otherwise?

A. Well, I did have her in my possession, for my brother had charge of her and took her to Shawnee after the time she was at Oklahoma City and at the time I had her, why, she got so in the winter afterwards you couldn't tell she was lame, but she still had the thickness there and when you stepped her up fast she would nod, she would show lameness in that leg. I sold her to Mr. A. M. Coffin for my brother conditionally, and he took her to Mr. Skaggs, a trainer there, and Mr. Skaggs drove her a while, I think a couple of months probably, and she got quite lame and Mr. Coffin refused to take her and I took her back and drove her on the road that summer; Mrs. Smith drove her on the road that summer and the fall my brother ordered me to put her on a car and ship her to Chicago at public auction and sell her and I did so and she brought \$400.00, I think something like that, about \$325.00 after the freight and expenses were paid.

Q. You say you sold her to Coffin. What was the contract with Coffin as to the sale?

A. Well, the deal I had with Coffin was I gave him \$6500.00 for a building in Shawnee and turned this mare in, a two story brick building, and turned this mare in at \$1500.00 provided she got so she could stand training and if not I was to pay him \$1500.00 and she got lame and wouldn't stand training and he turned her back to me and we sold the building directly after that and paid him that amount of money in the deal. That is he got that much out of it, I didn't pay him the money.

Q. Basing your opinion upon the conformation of this mare Sousa Mc what can you say she was worth prior to her injury?

To which defendant objects for the reason it tends to vary the terms of a written contract.

Overruled. Exception taken.

265 Overruled. Exception taken.

A. Well, the mare that had only been trained the length of time she had, her value was a little indeterminate. I would say on what she could show and to the public and a stranger her market value at that time would be somewhere near \$2,500.00.

Q. In the condition she was in?

A. Yes sir. The racing public go by what they know. Sometimes if they know what the opportunities are a horse had had it goes a good deal towards the price in selling them. She might have gone on and been a very good mare and increased in value and she might have gone on and demonstrated that she wouldn't fulfill expectations and decreased in value.

Q. Basing your opinion upon her training and with the fact that she was injured in the manner in which you testified she was injured—what would be her value after that injury?

A. I think she brought about what she was worth about \$400.00. I don't think she ever will race. In my opinion her injuries were such she could never race. She might go one race or two and then break down. That's been my experience with horses that have had similar injuries. I have seen them kept up a month or two and then lay down, but such an *an* injury as she had is permanent.

Q. State if you know why she did not finish her engagements at Wichita, Fort Worth, Dallas and Oklahoma City?

Objected to by defendant as incompetent, not proper issue in this case.

Overruled. Exception taken.

Objected to further by defendant as not proper method of estimating or determining damages.

Overruled. Exception taken.

A. It was on account of her lameness, unfitted her to compete in these races. She couldn't trot.

Q. Did Sousa Ne fill her engagement at Lawrence, Kansas?

A. Yes she made a stagger at it. She started in that race and was distanced, the second heat I think, the miles were run in 29, 30 and 35.

Cross-examination by Mr. GREEN:

Q. Mr. Smith you were down the night the horses were loaded and saw the car didn't you?

A. I think I did. They were switching the car when I saw it and they loaded the horses I think while I was up at the office, refreshing my recollection, and when I came out of there or somewhere around the building, they had switched the horses down a ways and that's why I didn't see them after they were loaded.

Q. Did you see them after they were loaded in the car?

A. I don't believe I did.

Q. You said I believe that the car was a furniture car—larger than the ordinary box car?

A. Yes, when I said that, I think the car was pointed out to me, pulled up there and a man said that is the car for these horses.

Q. Do you know whether it was a Santa Fe car or some foreign line car?

Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception taken.

A. I never noticed that.

Q. Do you know about what the length of the car was—whether it was more than ordinary length?

A. No sir, I couldn't say. I don't know what an ordinary length car is, to tell you the truth; I know something about those cars too; but it was a fuller car looked to me, than the average box car. I don't think it was any longer.

Q. Is that the usual way to ship first class race horses by 267 freight or not? They usually ship by express.

Objected to by plaintiff.

Overruled. Exception taken.

A. Well, if they are shipped a long way they generally ship by express but a good many horses are shipped by freight. Some shippers regard it as nearly as safe. I will say I don't, in shipping long distances enough for them to get very tired.

Q. What other stuff was loaded in this car other than these for horses?

A. Well, I think there were a couple of bikes.

Q. They are the sulkies.

A. A bike is a low wheel, long shaft cart, that looks like a sulky—a little heavier.

Q. Did you use these in the races?

A. Sometimes they would; they weigh about forty pounds; sulkies weigh about thirty pounds.

Q. What else did you have?

A. A sulkey in there and a trunk of boots and harness.

Q. There were three vehicles?

A. Two vehicles I think, there might have been three, they might have had another cart I don't recollect about, they had a trunk of boots and blankets, a sack of feed, and stuff that goes with horses.

Q. A wagon load of stuff other than the two horses wasn't there—all that stuff?

A. Well, just an ordinary spring wagon load probably.

Q. Did you have any bills or receipts or anything of that kind for that stuff?

A. I don't know, Mr. Green. My impression is it was charged for, I think this cashier said he would—

Q. The bill of lading only calls for four horses?

A. Yes sir.

Q. And the receipt shows only four horses.

A. That's all.

268 Q. Now what I was trying to get at, whether there was any bill or freight receipt or anything of that kind for the sulkies and trunk and boots and feed?

A. I don't recollect ever seeing it if there was. There might have been.

Q. You made a deposit of some money there with the Clerk?

A. That's my recollection.

Q. You don't know whether it was \$15.00 or \$20.00. It might have been \$15.00 or it might have been \$20.00?

Q. It runs in my mind it was twenty but it could have been pos-

sible I gave him the \$20.00 bill and he gave me back some change, but I think it was \$20.00.

Q. But it might have been fifteen?

A. It might have been. It might have been. It don't seem to me it was though. It seems to me he just kept the \$20.00.

Q. Did he give you a receipt of any kind at any time?

A. It kind of runs in my mind I signed a receipt that this paper that you had here, probably, I don't recollect.

Q. That shows a receipt for \$17.60 for these four horses.

A. Yes.

Q. Did you sign it then or this day it was presented to you out at the stock yards?

A. Well, I wouldn't be certain about that.

Q. This is dated September 18th, 1907?

A. Yes sir. That was on Tuesday—no, that would be, the 16th I believe was Monday—that would be Thursday.

Q. The horses were shipped the 17th?

A. I think they were loaded on the night of the 16th.

Q. Yes. And arrived in Lawrence on the 17th?

A. That's what I mean, they got there the 17th and this transaction I speak about, conversation, appears to me to have occurred a day or two days afterwards, it might have been a day but it occurs to me it occurred the next day. It might have been two days.

269 Q. This is your signature?

A. It looks very much like it.

Q. Exhibit "B," Mr. Moore's deposition on cross examination?

A. Yes sir, I think it is.

Q. It's Mr. Moore's name but you signed it?

A. Yes sir, yes sir. The shipping was generally done, I think, in Mr. Moore's name.

Q. You havn't any receipt have you given you by the railroad Company?

A. No I haven't and don't know whether any receipt—as I say, whether that was given me at the track or whether I signed it down there, it seems to me at the track. I just gave him the money. We were standing there.

Q. About \$2.60 you think?

A. Yes sir, we were standing near the judge's stand and he asked me if my name was H. H. Smith and he said we will settle that freight matter now, there is a balance coming.

Q. The \$15.00 and two sixty he collected, that would make \$17.60 and that in all probability is the receipt you signed?

A. You mean out at the track?

Q. Yes sir.

A. It might have been possible, but it didn't seem to me I signed it there, it seems to me I signed it there at the office, I know I hesitated about signing it, but it seemed to me it didn't make any difference anyway and I signed it.

Q. That was the receipt you signed the railroad company and was the amount of freight you paid on these horses?

A. Well, I signed it. I don't know whether I paid as I say—I

suppose that's what it was intended for. We had the conversation before I ever signed it.

Q. Now, were any of these other horses entered in the races there?

A. Well John Drew I think was entered in the 28 trot or 270 25 trot; and Don Ex Tallion in the three year old pace. He started. We didn't start John Drew. Mr. Robinson had the mare called Nancy Alden in a pace there and he didn't start her. John Drew was a young trotting horse and I think we took him to the track and he didn't act like he wanted to trot, seemed to be muscles sore.

Q. How long did you keep these horses at Lawrence?

A. The pacing horse Don Ex Tallion belonged to me. We did start him. He went the two first heats fairly well and then kind of quit.

Q. Isn't it a fact Sousa Mc raced on the 18th—there were four horses in the race—and she came out fourth place in two heats, and was distanced in the third heat?

A. It might be that way, it might be, yes she was either distanced in the second or third heat, it runs in my mind it was the second heat.

Q. Isn't it a fact neither Nancy Alden nor John Drew were entered in any of the races at Lawrence, Kansas?

A. You mean in the sense they were entered before the entries closed.

Q. I don't know what the parlance is in race horse life but I suppose you have to make an entry sometime.

A. I was at Lawrence before I went to Kansas City and the Secretary told me those classes would be open classes, and these horses could be raced there if they were shipped.

Q. What do you do when you make an entrance in a horse race. Do you have to put up any money?

A. It depends on how well you stand in with the Secretary and how flush you are.

Q. How well did you stand in with the Secretary?

A. He was a pretty good friend of mine and I could have raced on credit I think.

Q. Was that the way you raced up there?

271 A. Sometimes, yes sir.

Q. Was that the way you proposed to race at Dallas and Fort Worth?

A. No, what I mean is, if the Secretaries conform to the rules of the National Trotting Association you are requested to pay your entry fee at the time you enter. If the entries close ten days before the races are supposed to be had you must pay them and send your money and check with your entry fee but if the secretary knows you and that you are good for it you can send the entry and write on the entry conditional, if I get there, or if the horse is alive, or something and he stores that away till you get there and if you want to race—

Q. If you don't get there you get it back?

A. If you don't get there you don't have to pay and if so you

walk up and pay because the association would be expelled for accepting a conditional entry I mean.

Q. Now, at the time these horses were unloaded at Lawrence, Kansas, you knew then they had received some injuries at that time didn't you?

A. I didn't know it until I saw the boys, and they were unloaded when I saw the boys first.

Q. They were around in that vicinity, either at the stable or on the road?

A. I saw them at the stable, yes sir, they took the bandages off there and I examined them. That was about an hour after they were unloaded.

Q. At any time after you knew these horses were injured did you serve any notice on the railroad company prior to the time the horses were removed from Lawrence, Kansas, notifying them these horses had been injured?

A. I didn't, no I regarded the conversation as sufficient—that's all.

Q. Where is Sousa Me now?

A. Well sir, I don't know, but I think she is owned by a man in Baltimore Maryland, a man named Vipon. He is a Panama Canal Contractor or something.

272 Q. You shipped her to Washington?

A. No, to Chicago, and had her sold at public auction.

Q. Sold her to this man?

A. Yes sir, bought her,—I started to ship her to Washington, I believe, and he intercepted her and had her sold in Chicago.

Q. Were you there when she sold?

A. No sir, Mr. Moore accompanied her.

Q. Where is Moore now?

A. I think he's at—I think at Sapulpa. He's in the employ of the Fred Harvey Company,—some kind of an auditor.

Q. The value of a race horse is speculative in a way?

A. Yes sir.

Q. You cannot tell exactly what they are going to do at every performance or the next season?

A. It depends entirely on the horse. A Young horse will vary more in their races than an aged horse. In the fall of the year a stallion races with more regularity, at the same speed, than any other kind of a horse, and an aged gelding is the most regular kind of a race horse. The most irregular kind of a race horse is a mare. If they race consistently when they are colts you can figure they will be pretty reliable when they are aged.

Q. You can never determine to any degree of certainty where you are coming out in a race; that is merely a matter of speculation?

A. Not altogether. If you know the condition of your own horse and what kind of footing that horse likes and the kind of footing you are going to have, and have a pretty good line on the other horses, sometime you think you have a line on them and haven't and all of these things enter into it.

Q. There is always some jockeying too that goes on in a horse race?

A. Yes quite a little.

273-304 Q. You can't tell where that's going to put you?

A. No, I have seen some mighty good horses that ought to win, lose on that account.

Plaintiff rests.

Comes now the defendant and demurs to the evidence on the ground for the reason the plaintiff has failed to prove a cause of action in favor of the plaintiff and against the defendant.

Which demurrer is by the court overruled, to which ruling of the court the defendant excepts.

305 L. E. DUBOIS being called and duly sworn as a witness on behalf of the defense testifies as follows upon direct examination by Mr. Green.

Q. State your name to the jury.

A. L. E. Dubois.

Q. How old are you Mr. Dubois and where do you reside?

A. Thirty, Kansas City, Mo.

Q. What position do you occupy with the defendant, the Atchison, Topeka and Santa Fe Railway Company? What position did you occupy in Sept. 1907.

A. Night Chief Clerk.

Q. Were you in charge of the station at the time this shipment was made?

A. Yes sir.

Q. What are your duties as chief clerk Mr. Dubois?

A. Just in charge of things generally of the division.

Q. Did you have general supervision of the office while you were on duty?

A. Yes sir.

Q. Do you recall the shipment of horses in question?

A. Only from the records.

Q. You have heard the testimony of Mr. Robinson here in reference to the shipment of the horses?

A. Yes sir.

Q. Did you issue any live stock contract for those horses?

A. Yes sir.

Now comes the plaintiff at this time and objects to the evidence of the witness for the reason that the same is incompetent immaterial and irrelevant under the issues in this case, and for the reasons stated to the introduction of the testimony in the depositions of the witnesses Gilmore and Smith in relation to the contract as offered in evidence heretofore.

Objection overruled. Exception taken.

A. Yes sir I did.

306 Plaintiff moves to strike out answer and question of witness because he has stated he only knows from the record and not of his own personal knowledge.

Objection sustained. Exception.

Q. Have you refreshed your recollection from the record?

A. I have.

Q. And you have an independent recollection other than the record as to what was done there in relation to issuing the live stock contract.

Objected to by the plaintiffs because witness has already said he had no recollection except from the records themselves.

COURT: Let him answer if he knows.

Plaintiff excepts.

A. Well no, we handle so many there we can't tell anything about them only from the records.

Q. Have you examined this contract that has been introduced in evidence?

A. I made it.

Q. Is your signature attached to that contract for the railroad company?

A. Yes sir, two places.

Q. Who else signed that contract?

A. H. F. Moore.

Q. Do you know H. F. Moore?

A. No sir.

Objected to by plaintiff unless he saw him sign that contract.

Q. Did you see that party sign that contract?

A. Yes sir.

Q. It was signed in your presence?

A. Yes sir.

Q. Did you see the horses?

A. No sir.

Q. Did the party signing this contract ask you to look at the horses?

A. No sir.

Q. Did he tell you anything about the horses as to the kind or character of horses?

307 A. No sir, just four horses is all the bill of lading calls for.

Plaintiff objects as incompetent, irrelevant and immaterial and moves to strike out the answer because he says its all the bill shows for and don't show he is going by the contract or his own independent recollection.

Sustained and ordered that answer to stricken out.

Defendant excepts.

Q. Did you see the horses? Mr. Dubois?

A. No sir.

Q. Did he ask you to see the horses or look at them?

A. No sir.

Plaintiff objects to any further questions along that line for reason witness said in the beginning there was nothing whatever said about them and he didn't remember.

Overruled. Exception.

Q. Was there any other contract of shipment made at the time these horses were delivered to the railroad company other than this contract?

A. Well, there would only be one contract.

Plaintiff moves to strike out answer of witness as not responsive to question.

Motion sustained. Exception.

Q. Is that the contract that you have upon which this shipment was made?

A. This is the original contract, yes sir.

Q. What did you do in relation to having a way bill or anything done after the contract was signed up?

A. Well, the way bill would be made up after he left.

Plaintiff moves to strike out answer as above.

Sustained and ordered that answer be stricken.

Exception.

Q. Did you cause a way bill to be issued and made for these horses?

A. Yes sir.

308 Objected to by plaintiff as leading.

Q. Do you know what length of car, what kind of car these horses were loaded into?

A. A 36 foot car.

Q. Was it a stock car or a box car?

A. A box car.

Q. I here hand you Exhibit "B" and ask you to state what it is.

A. That's the way bill for the car.

Q. Is that the original way bill?

A. Yes sir.

At this time defendant offers in evidence original way bill of the car in question.

Admitted in evidence.

Objected to by plaintiff as incompetent, irrelevant and immaterial and not competent for any purpose except to show the contract of shipment was entered into and defendant does not testify from his own personal knowledge he knows the way bill was made and for reasons offered to previous witnesses and testimony in relation to the contract in this case.

Overruled.

Exception.

Permission is given defendant to withdraw original and substitute copy of way bill.

Q. I want to read to the jury part of the original way bill. It is dated Kansas City, Mo., September 17, 1907, number car 1829297. H. F. Moore, consignee, shipper; consigned to H. F. Moore, 4 horses, 20000 pounds, rate of freight \$17.60, O. R. L. C. Relates value as per contract. Owner in charge. Mr. Dubois, what is the abbreviation O. R.?

A. Owner's risk.

Q. What is the L. C.?

Objected to as incompetent, irrelevant and immaterial and plaintiff moves to strike out answer.

Overruled. Exception.

309 Q. As Chief Clerk of the railroad company do you have in charge the tariff and publications in relation to rates?

A. Yes sir.

A. I hand you here a copy of the Santa Fe System tariff No. 6180 D and other tariffs with the certificate attached of Edward A. Mosley, Secretary of the Interstate Commerce Commission, and bearing the seal of that commission, I will ask you to refer to the tariff and state what the rate of freight was on this car and the conditions of the tariff in relation to its moving and handling?

Plaintiffs object to introduction of testimony for the reasons heretofore given in reference to the contract in reference to other evidence in this case and for further reason the record of rates is the best evidence; no proper foundation laid for the introduction of this evidence and the witness can only testify as to what he knows and not from the record itself.

Overruled.

Exception.

Q. Now Mr. Dubois, did you have this tariff on file in the office at Kansas City at the time this shipment was made.

A. I might not have had this particular one but we had a copy of it.

Q. You had a copy of this tariff on file?

A. Yes sir.

Plaintiff moves to strike out because witness not shown competent and his own answer makes him incompetent to testify in reference to the rate.

Sustained.

Exception.

Q. Mr. Dubois, did you have the tariffs in charge?

A. Yes sir.

Q. Do you know whether a copy of this tariff was on file in the office at Kansas City at the time this shipment was made?

310 A. We have a copy of all the tariffs in use on the system.

Move to strike out answer as incompetent, irrelevant, immaterial Sustained. Exception.

Q. Did you have a copy of this tariff on file at Kansas City at the time this shipment was made?

A. Yes sir.

Q. Did you have occasion to consult this particular tariff at the time this shipment was made? Or about that time?

A. I did, to get a rate on the car.

Plaintiff objects to question and answer and moves to strike it out.

Q. Did you consult the tariff in this particular case?

A. I did.

Q. Now, Mr. Dubois, I will ask you whether there were notices published in the depot, in the office, in which this tariff was filed calling the attention of the public to the fact they were on file and subject to public inspection?

A. There was one upstairs and one down.

Q. Now I will ask you to refer to the tariff and read to the jury the rate of freight that would govern on this shipment and the provisions relating thereto.

The plaintiff objects to further question in reference to the contracts in this case in posting rates for the reason the witness testified in former answer that his posting of the rate was had in the depot and one upstairs in a place called the office or not named, and that his testimony showed the defendant failed to comply with the Interstate Commerce Act and the plaintiff now objects to further introduction of any evidence on that question, the question of the reduced rate and the contract, and moves to strike out all of the witness's testimony heretofore introduced with reference to the posting of rates for the reason his testimony shows the defendant failed to comply with the requirements of the Interstate Commerce Act.

311 Overruled.

Exception.

Q. Now refer to the tariff Mr. Dubois and read to the jury that portion of the tariff which relates to the shipment in question.

Same objection as above.

Overruled. Exception.

A. Well, the tariff shows a rate from Kansas City to Lawrence on horses in standard cars \$16.00.

Q. Go on and read the rest of it, refer to that part of the tariff.

A. When the rates named in section one—

Plaintiffs object to witness reading from the schedule of rates. They are the best evidence themselves and same incompetent, irrelevant and immaterial. He can testify of his own independent recollection if he knows what the rates are but cannot introduce in evidence by reading from a copy of the rates on hand without showing what has become of the original.

Sustained. Exception.

Attorney for defendant asks at this time to read that portion of the tariff and introduce in evidence item 27 page 35 of the tariff.

Plaintiff objects to the introduction and reading of that portion of the tariff because it is not shown it is the original tariff on file at that time and for further reason the rates were not properly posted. It is not shown it was the rate incorporated in his contract of freight pleaded in defendant's answer and that the evidence is incompetent because no proper foundation has been laid in that respect.

Overruled. Exception.

312 Mr. GREEN: Q. Section 27 charges for cars under that standard, where the rates in Section One are named in dol-

lars and cents per car. Such rates will apply on live stock in either common or palace cars of under 29 feet to and including 30 foot 6 inches inside measurement such cars to be known as standard cars. Cars less than 29 feet will be charged forty-nine per cent of the tariff for standard cars. Cars over full 32 feet will be charged a hundred and four per cent of tariff for standard cars. Cars over 32 feet to and including 33 feet nine inches will be charged 107 per cent of the tariff for standard cars. Cars over thirty three feet nine inches and including thirty six feet six inches will be charged One hundred and ten per cent of the tariff of standard cars.

Now comes the plaintiff and moves to strike out all that portion of rate read by the defendant's counsel in this action because the contract presented by the defendant does not specify nor set up any rate but says the rate is a reduced rate without referring to the rate which defendant's counsel is undertaking to read into the evidence in this case, and same for that reason is incompetent, irrelevant and immaterial and further objects to the introduction of the rate in the answer of the witness and questions of counsel for the reason there has been no proper posting to comply with the Interstate Commerce Act.

Overruled. Exception.

Mr. GREEN: Section 18, live stock at Owner's Risk, page 84 of tariff, Rates named in section One will apply only to shipments of live stock made at owner's risk and limitation, upon declared valuations shown below, of the liability of this company or other companies, parties to this tariff as common carriers under the ~~rules~~ and conditions of the current live stock contract provided by the said railroad companies, said contract to be first duly executed in manner and form provided for therein.

(a) Rates are based upon declared valuations by the shipper, not to exceed the following:

Every horse or pony, gelding mare or stallion, mule or jack, \$100.00.

Every ox, bull or steer \$50.00.

Every cow \$30.00.

Every calf \$10.00.

Every hog \$10.00.

Every sheep or goat \$3.00.

(b) Where the declared value exceeds the above an addition of 25% will be added to the rate for each one hundred per cent of fraction thereof of declared additional valuation per head.

Animals exceeding in value \$800.00 per head will be taken only by special agreement.

(c) One hundred and fifty per cent (150%) of the rates named herein will be charged on shipments of live stock made without limitation of company's liability at common law and under this status shippers will have the choice of exercising and accepting contracts for shipment of live stock with or without limitation of liability and rates accordingly.

Plaintiffs object to the reading from the rates as incompetent,

irrelevant and immaterial under the issues in this case and move to strike out all that portion of rates in reference to the reduced rates read from the copy of rates purported to be on file with the Interstate Commerce Commission for the reason that the reading of the provisions from the quoted rates specify that the contract referred to must be a contract where there is an agreed or declared valuation and the contract pleaded in the answer of the defendant shows there was no agreed or declared valuation but that the settlement was to be upon the total cash value and that it is a contract of limitation and not a contract of agreed valuation.

Overruled. Exception taken.

Q. Mr. Dubois, I believe you answered a while ago, this
314 was a 36 foot car?

A. Yes sir.

Q. What would be the rate according to this tariff from Kansas City to Lawrence, Kansas, on the four horses shipped in this car under this tariff?

Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

Q. In a 36 foot car?

A. \$17.60.

Q. \$17.60?

A. Yes sir.

Answer objected to as incompetent, and plaintiff moves to strike it out because he read from book and has no independent recollection of same, and not competent to testify.

Overruled. Exception.

Q. If these horses had been valued at more than the declared value of \$100.00 what rate, according to this tariff, would the shipment take?

Objected to by the plaintiff, the witness is not shown himself competent to testify and counsel must hand him the rate which is not proved to be the rate provided and posted by the Interstate Commerce Act to refresh his recollection, that his statements are hearsay and incompetent.

Sustained.

Exception.

Q. From the tariff which you have before you, I will ask you to state if the horses had been valued at more than \$100.00 what the rate would have been on the shipment?

Objected to as incompetent, irrelevant and immaterial.

Q. Do you know what it would be?

A. If there was more than \$100.00?

315 Q. Yes sir.

A. That depends on what the valuation was.

Q. Well, say they were valued at \$200.00 what would the rate have been?

Objected to as incompetent, irrelevant and immaterial under the issues in this case, defendant has plead \$100.00 limitation and not \$200.00.

Sustained.

Exception.

Cross-examination by Mr. SMITH for Plaintiff:

Q. How long have you worked for the Santa Fe?

A. It will be seventeen years next September.

Q. How long have you worked in this office at Kansas City?

A. All the time.

Q. How long have you occupied the position of Chief Clerk?

A. Ten years in September, that is night chief clerk.

Q. What time are you on duty?

A. At six P. M.

Q. About what time—do you know the kind of man Mr. Moore is, do you know who he is?

A. No sir.

Q. Do you know Mr. Robinson over there, is he the man who signed the contract?

A. I cannot tell you now.

Q. Do you recollect what kind of looking man signed it?

A. No sir.

Q. Did you see him more than one time?

A. Why I don't know that, no sir.

Q. Was it your duty to make out these contracts?

A. Yes sir.

Q. Did you tell him about a reduced rate before you took the contract?

Objected to as incompetent, irrelevant and immaterial.

316 Overruled. Exception.

Q. Did he say anything to you about wanting a reduced rate?

Objected to as above.

Overruled. Exception.

A. No sir.

Q. No conversation whatever was there about a reduced rate Mr. Dubois?

Objected to as above.

Overruled. Exception.

A. No sir.

Q. What did he say when he said he wanted to ship those horses just state the conversation?

A. Well, I cannot state the conversation word for word, he probably came and asked for a contract.

Plaintiff moves to strike out answer, the latter part of it, as not responsive to question.

Sustained.

Q. You don't know whether Mr. Robinson or Mr. Moore came up there do you Mr. Dubois?

A. No sir.

Q. You don't know who signed that contract except by the name on it?

A. That's all, I wouldn't know the man.

Q. You don't know whether it was Mr. Moore or Mr. Robinson do you?

A. No sir.

Q. You couldn't tell what kind of a looking man now he was who signed the contract?

A. No sir.

Q. Did you have any conversation with him prior to the signing of the contract?

A. No sir.

Q. When did he sign this contract?

A. Why I think it was about 8 o'clock in the evening.

317 Q. Two hours after you went on duty?

A. Yes sir.

Q. You go on at six?

A. Yes sir.

Q. Horses had already been loaded then had they?

A. Yes sir.

Q. Mr. Dubois, where is your office now, tell the jury, just describe that building.

A. You mean the location of it?

A. No, the arrangements of it, where is your office?

A. The office is on the north end of what they call the in freight house.

Q. Upstairs?

A. Yes sir.

Q. First floor?

A. Second floor.

Q. Where is the agent's office?

A. Downstairs, in the Superintendent's office.

Q. Where are the bills of lading always made out?

A. Upstairs.

Q. Where are the contracts for freight made, with the agent or Chief Clerk?

A. No, the clerk is upstairs.

Q. But the understanding and agreement etc. is made with the agent if it not, that is ordering of cars, etc.

A. No sir, the agent has nothing to do with that at all.

Q. Is there a depot there at this particular place?

A. A freight depot. No passengers there.

Q. Now you say you had one of these publication notices posted down was it in the agent's office?

A. No, it was in the hall downstairs.

Q. And you had one posted up in your office?

318 A. In the hall upstairs.

Q. Mr. Robinson or Mr. Moore say anything to you about—you say they didn't tell you those were race horses?

A. No sir.

Q. Did they tell you what they were going to Lawrence for?

A. No sir.

Q. Did they tell you what kind of a freight they wanted to ship on, what kind of a train they wanted to ship these horses on?

A. No sir.

Q. Did they have them billed out to go on the Red Ball fast freight that night?

A. We always bill everything to go on the first train.

Q. Isn't it a fact the Red Ball is what you call a fast freight?

A. Yes sir.

Q. You say Mr. Robinson and Mr. Moore never said anything to you about going out on this train?

A. No sir.

Q. Did you say anything to them about going out on this train?

A. No sir.

Q. What do you say now as to how the horses were billed, were they billed to any particular train?

A. No sir, we don't put anything like that on the billing.

Q. How does the conductor get the billing?

A. From the yards at Argentine?

Q. How do you get the billing there?

A. By messenger boys.

Q. Do you designate the train the particular stock is going on—the number of it?

A. No sir.

Q. Do you designate the car?

319 A. Well, every way bill has the car number on it?

Q. And the conductor gets the way bill?

A. Yes sir.

Q. When you make up a train out in the yards at Kansas City or Argentine how do you indicate the cars that make up that train?

A. Well, the cars are carded in the yard.

Q. They are on the way bill are they not and where they stop?

A. No, the carding is not on the way bill.

Q. What is in the way bill?

A. The contents and the consignee and the consignor and character and destination.

Q. Do you know who got this particular way bill that night?

A. No sir.

Q. Whom did you deliver it to?

A. To Argentine.

Q. You sent it over there by a messenger?

A. Yes sir.

Q. You don't know whether the conductor on the Red Ball Freight got it there?

A. No sir.

Q. Do you know when the horses were delivered into Argentine yards?

A. No sir.

Q. Know how long they were in the Kansas City yards?

A. No sir.

Q. You say Mr. Moore or Mr. Robinson got the billing about 8 o'clock?

A. About 8 o'clock.

Q. Now, Mr. Dubois, Mr. Robinson never represented to you the value of these horses did he, as being worth \$100.00?

Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

320 Q. Did Mr. Moore or Mr. Robinson or anybody say anything to you about these horses being worth \$100.00.

Objected to as above.

Overruled. Exception.

Q. Didn't ask you anything about any reduced freight rate?

Objected to as above.

Overruled. Exception.

A. No sir.

Q. When did you deliver this contract to him?

A. At the office upstairs.

Q. Horses were then already loaded?

A. Yes sir.

Q. Had he made arrangements with you to ship those horses before that time?

A. No sir.

Q. Who had he made arrangements with?

A. I never saw him or heard of him till he came up after the contract.

Q. Who usually makes the arrangements?

A. They have an empty car man there.

Q. When an order is telephoned into your office what do you do with it?

A. At night?

Q. Yes sir.

A. I would give the yard master an order to set the car.

Q. What is done with it during the day?

A. I think that's the same thing he does with it?

Q. He tells the yard master to set it?

A. Yes sir.

Q. Do you know of anybody that had any conversation with Mr. Robinson and Mr. Moore prior to the loading of these horses?

A. No sir.

321 A. No sir.

Q. You don't know of any solicitation on their part for a reduced rate?

Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

A. No sir.

Q. You testified Mr. Du Bois that this contract was the same rate

as specified in the circular from which you testified on file with the Interstate Commerce Commission, I will ask you to state what rate is specified in the contract that was signed there at that time by Mr. Moore.

A. There is no rate specified on the contract.

Q. You tell the jury that there was no rate specified in that contract? for the shipment of those horses?

Objected to for reason the contract is the best evidence.

Sustained. Exception.

Q. As a matter of fact Mr. Du Bois this is a printed contract that you keep on file on your office isn't it?

A. Yes sir.

Q. It's the same kind of a contract you hand out to everybody that ships horses isn't it?

Objected to as above.

Overruled. Exception.

A. Why we would change it if they put a bigger valuation on the horses than stated in the contract.

Q. Yes, it's the regular one sent out, unless they put a bigger valuation on the horses?

A. Yes sir.

Q. It's the regulation contract of the Company, printed in there before it's handed over to you?

322 Objected to as calling for a conclusion of the witness.

Overruled. Exception.

A. Yes sir.

Q. It's the regular rate specified in there for shipment of horse unless a man comes along and says he wants to pay a higher rate isn't it?

A. Yes sir.

Q. Now, do you know how many horses were in this car?

A. Four.

Q. You don't know what time it got to Lawrence?

A. No sir.

Q. How far is it from Kansas City to Lawrence?

A. I think about 44 miles.

Q. How long ordinarily does it take the Red Ball freight to run from Kansas City to Lawrence?

Objected to as immaterial.

Overruled. Exception.

Object in addition to competency of witness.

Overruled. Exception.

A. About two hours.

Q. What time is the Red Ball due out of Kansas City?

Defendant objects as incompetent, irrelevant and immaterial competency of witness not shown.

Overruled. Exception.

A. Well, the train that would handle that car now leaves Argentine at 10:15.

Q. I mean at that time?

A. I don't know, they change that time card every three or four months.

Q. You say you don't know when the Red Ball went out at that time?

A. No sir.

Q. Didn't you tell Mr. Moore or Mr. Robinson when it went out?

A. No sir.

323 Q. You didn't tell them what train they could get out of Kansas City on?

A. No sir, we don't promise any particular train?

Q. Did you tell him when he would get to Lawrence?

A. No sir.

Q. You didn't tell him whether he would get there next day in time for the races or not, then or when?

A. I wouldn't have any means of knowing when he would get there.

Q. Neither of them said anything to you about it?

A. No sir.

Q. Didn't make any inquiries?

A. No sir.

Q. You were the man who arranged the shipping—wrote out the contract for them?

A. Yes sir.

Q. It was your business to tell him if he had asked you?

A. Yes sir.

Q. It was your business to know wasn't it, if you were asked?

A. Yes sir.

Q. Now you say you didn't know what time he would get there and he didn't ask, is that the way you want the jury to understand it?

A. If he had asked me, I would have told him.

Q. You knew that?

A. Yes I knew, I had a time card.

Q. But you have forgotten since that time?

A. They change the time cards every few months—I don't know when that train left then.

Q. Do you know what time these horses actually got out of the yards at Kansas City?

A. No sir.

Q. You don't know anything about how long they were in Argentine?

A. No sir.

Q. Don't know anything about that?

324 A. No sir.

Q. Did you call Mr. Robinson's or Mr. Moore's attention to the posting or any rates or anything in that contract?

Objected to by defendant.

Overruled. Exception.

A. No sir.

Q. You just handed him the contract and showed him where to sign it and he signed it?

A. Yes sir.

Q. Took his contract and went on his way rejoicing did he?

A. Yes sir.

Redirect examination for Defendant by Mr. GREEN:

Q. When did the way bill go out of the office for this shipment?

A. Sometime next day.

Q. It was not delivered to the conductor of the Red Ball that night was it?

A. No sir.

Q. How are those way bills handled usually that are made out that way?

A. Well, those cars that are gone are mailed.

Q. When was this mailed?

A. Well, I couldn't say now.

Q. Was it mailed to the agent at Lawrence, Kansas?

A. Yes sir. It should have been if it went right.

Move to strike out answer as not responsive to question.

Overruled. Exception.

Recross-examination for plaintiff by Mr. SMITH:

Q. Mr. Du Bois, you don't know whether this contract here in evidence is the contract Mr. Moore signed or not do you, except you just see his name on there?

A. I say I made the contract, I don't know who signed it, 325 it's signed Moore is all I know.

Q. You are certain now you gave him the contract to sign?

A. Whoever signed the contract, I gave it to him.

Q. And you got that contract about two hours after the horses were loaded?

A. I don't know when the horses were loaded.

Q. You didn't see to that or have anything to do with that?

A. No sir.

Q. Did you give this contract to him about the time the horses left the yards there, and do you know when they left?

A. I don't know when they left.

Q. You don't know whether the conductor in charge of the train the horses were shipped in had any way bill or anything else?

A. He didn't have the regular way bill, he might have had a card bill.

Q. Don't you know as a matter of fact the agent at Lawrence next day tried to get the freight, a way bill and amount from your office?

A. No sir, I don't know anything about the agent at Lawrence.

Q. They never make any inquiries from you, the agents do not during the night about way bills?

A. No sir.

Q. Never call for them when they don't know where they are, what the rate of freight is to be charged?

A. No sir.

Q. You didn't send this rate of freight out until after the horses were shipped did you?

A. The bill was mailed next day, the 17th.

Q. And then you wrote this particular tariff or rate on that way bill?

A. No, I didn't make the way bill at all.

Q. Who made it?

A. The man's name is on there.

Q. How do you know it was sent next day?

326 A. Why it's dated next day, the 17th.

Q. That's the way you know it was sent next day?

A. Yes.

Q. As a matter of fact the way bill itself shows the rate of freight was never communicated to the shipper of that load of horses, don't it?

Defendant objects as immaterial.

Overruled. Exception.

Q. It wasn't made out till after they left there, next day?

A. It was made out next day, the 17th.

Q. And he couldn't have seen it?

A. No sir, he wouldn't have any business with the way bill.

Q. That's the only way he knew anything about the rate on freight, you say it was not specified in the contract, that's the only way he would know the rate of freight?

A. Yes sir.

Q. You never called his attention to it?

A. No sir.

Q. The way bill shows it was not sent out until next day?

A. Yes sir.

Redirect examination for defendant by Mr. GREEN:

Q. The tariffs were on file in your office and open to public inspection were they not?

A. Yes sir.

Q. And would have explained to the shipper had he asked you about the rate?

A. Yes sir.

Now comes the plaintiff and moves the court to strike out all evidence of witness for the reason he testified the contract shows no rate of freight was specified and for the further reason that witness testifies the way bill which set out the amount of freight paid was never brought to the attention of the shipper; that he had no opportunity to know what that rate was; that the way bill

327 specifying the amount of freight and the rate was not sent out until next day after the shipment was made and never brought to his attention and further could not be any consideration

that would bind him under that contract under the laws of Missouri; and for further reason the witness shows the rates were not posted according to requirements of the Interstate Commerce Commission which would put in force rates sought to be plead here by the answer and contract.

Overruled. Exception.

328 (Sante Fe.) Hall 6-07-250M-5893. Form 1826—A regular.

Way-Bill Series
Number 14921.

The Atchison, Topeka & Santa Fe Railway Company. Car.

Initials Number

AT 29297 Mail "X"

Date Sept. 17/07. Freight.

From 458 Ka's City, Mo.	To Lawrence, Ka's.	Leave this space for Symbol stamp.
Via Junction with	Via Junction with	
Ry.	Ry.	
Route via Junction with	Via Junction with	
Ry.	Ry.	

Weight this	Length of	Marked capacity	Gross weight of
car at—	car,	of car,	car and contents,
	feet and inches.	pounds.	in pounds.
.....	36	—	—

Spot this car	For additional charges see	Way-Bill maker
	W.—B.	and block No.

At	For	Station	Date
		"A"	

Estimated weight, for use of Conductor only,	Transferred at
Of car (tare).....	Into car initials..... No.....
Of contents.....	Transferred at.....
Total.....	Into car initials..... No.....

Shipper, con- necting line refer- ence, origi- nal car and way-bill No.	Marks, consignee, and destination.	No. of pack- ages.	Articles and classi- fication conditions (O. R. C. R., Rel., Gtd., etc.).	Weight.	Rate and au- thority.	Freight Ad- van- ces.
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H. Moore. H. F. Moore.	4 Horses.	O R LC	20000	1760	1760	
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REL	Contract value					
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Owner in charge with contract.	Lam- born.
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Agents at Junction Stations receiving this Way-Bill from connecting lines must stamp in spaces below in consecutive order, the names of their stations and date upon which the Way-bill is received.

1892.

1	2	3	4
Stamp of Junction forwarding agent.	Stamp of Junction forwarding agent.	Stamp of Junction forwarding agent.	Stamp of Junction forwarding agent:

[In red ink:] C. A. C# 10556. L.

329 Scale weight at

Agent at	
Desti (A., T. & S. F. R. R.)	nation
will (Freight)	enter
herein ()	the
(Sep.)	
(18)	
(1907)	
(Lawrence, Kan.)	
Date	Reported

Card Way-Bill Must Be Attached (Not Pasted) To the Regular Way-Bill Before Sending to Audit Office.

NOTE A.—In this particular bill agent will enter—On Car Loads Only—tare weight of car, weight of load, and total.

Agents.—In column headed "Authority" agents will note the number of Special rates number of Special Order or Tariff, as the case may be. Agents are in no case to make a way-bill to cover more than one car. A way-bill must be made for each and every car. When billing car loads from a station having no track scales, agents must enter on the face of the way bill the name of the station at which car is to be weighed.

When a through rate is used and shipment is to be re-way-billed en route, the subdivision must be shown in the rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

330 J. E. HULT being duly called and sworn as a witness in behalf of the defendant testifies as follows upon direct examination by Mr. Green.

Q. State your name.

A. J. E. Hult.

Q. Where do you live, Mr. Hult?

A. Freemont, Nebraska.

Q. Where were you employed in September, 1907.

A. In the local freight office of the A., T. & S. F. at Lawrence, Kansas.

Q. Who was the agent at Lawrence at that time?
A. George C. Bailey.
Q. Do you know where he is now?
A. He died on the 27th of November, 1907.
Q. What position did you say you occupied there?
A. Cashier and Chief Clerk.
Q. As Cashier and Chief Clerk what were your duties?
A. As Cashier I kept the accounts of the station and as Chief Clerk had general supervision of the local freight station.

Recess for five minutes and jury admonished.

Q. Did you as chief clerk have supervision of the tariffs and publications in relation to rates in the office?

Same objection as made heretofore in all particulars to testimony of witness in reference to evidence and contracts is now made to any evidence this witness may give in this cause as to the rate and as to the contract etc.

Overruled. Exception.

A. Well we had a rate man whose duty it was to make all rates and to keep the tariffs and the supplements filed but it was my duty as chief clerk to check them up and see they were kept properly filed.

Q. I hand you herewith Santa Fe tariff number 6180 D 331 and ask you if that tariff and supplements was on file and open to public inspection at the depot at Lawrence, Kansas, in September, 1907.

A. Yes sir it was.

Q. I will ask you to state whether or not notices, and if so how many, were posted in the depot calling the attention of the public that the tariffs were on file and open to public inspection?

A. We really had three notices, two in the lobby, one on a bulletin board we used for the purpose and one over the counter where everyone who had business there couldn't help but notice it; we also had one in the front room. We had a bulletin board in the front room we kept all circulars and notices of changes and everything that would interest the shipping public.

Q. Do you recall the shipment in question—these horses?

A. Only parts of the transaction, I recall.

Q. What part of the transaction do you recall?

A. Well, I don't remember Mr. Smith personally, but he was with Mr. Dunkle and I remember Mr. Dunkle came down inquiring about the horses early in the morning and my other recollection is in regard to the collection of the freight charges.

Q. How much were the freight charges you collected on this shipment?

A. When the shipment came in we had no way bill, we didn't know at that time whether the shipment had been accorded car load privileges; there was four horses in the shipment and the western classification provides one horse should be minimum 2000; 2 horses 3500; 3 horses 5,000, and every additional horse 1000 pounds mak-

ing for four 6000 pounds which would be a first class rate from Kansas City to Lawrence, is 25 cents per hundred. At the time the shipment was delivered I was not in the office, I was up town making a collection, but when I came back the matter was called to my attention and a deposit of \$15.00 was made to cover the less than car load charges from Kansas City to Lawrence with the understanding any additional charges would be collected later.

332 Q. Were any additional charges collected?

A. When the way bill came in I was carrying the freight charges; I gave the freight bill to the agent, Mr. Bailey, and he first went over to Mr. Gallagher's, the livery man who run the livery barn there and wanted to make the collection there but he referred him to the fair grounds where Mr. Smith could be found and I presume Mr. Bailey went out and collected the balance of the charges because he turned the money over to me \$2.60. Making a total of \$17.60.

Q. \$17.60 which would be the car load rate from Kansas City to Lawrence? I hand you here a paper which has been introduced in evidence marked "B" and ask you to state if that way bill passed through your office?

A. It did, it passed through the station agent September 18th 1907, there's the local station stamp; the date it was recorded, and here's the date received.

Q. And what were the freight charges on that way bill?

A. \$17.60.

Q. Did you examine the receipt that was introduced in evidence here attached to the deposition of Mr. Moore and introduced in evidence?

A. I have seen it, yes sir.

Q. Is that the receipt that was secured by the railroad company by Mr. Moore or someone representing him, covering the freight charges in question?

A. That was the receipt we held for the shipment.

Q. I here hand you the receipt and ask you to identify it?

A. Yes sir, that is the receipt for the freight, that is for the four horses.

Q. Now, did anyone representing the plaintiff, either Mr. Smith, Mr. Moore or Mr. Robinson, make any complaint to you or serve any written notice on you in relation to any damages that these 333 horses are alleged to have sustained?

Objected to as incompetent, not claimed any notice was served on him, or any notice given him.

Overruled. Exception.

A. No sir, they did not.

Cross-examination on behalf of plaintiff by MR. SMITH:

Q. You were then the cashier?

A. Yes sir I was.

Q. You don't know whether you collected \$15.00 or whether somebody in your office did?

A. That was collected during my absence.

Q. You don't know when this receipt was given?

A. I cannot say.

Q. You only go in your testimony from the fact the receipt was given, and you only go of your knowledge of the amount of money charged on the way bill that you indicate there?

A. How is that?

Q. Question repeated.

A. No sir.

Q. Do you recollect independently that amount of money was paid?

A. I remember the transaction because I remember giving the freight bill to the agent to collect the balance.

Q. Who went up to Mr. Gallagher's at the livery stable?

A. Mr. Bailey.

Q. You don't know what was said to Mr. Bailey about the horses do you?

A. I do not.

Q. He was your superior there in the office?

A. Yes he had charge of the station.

Q. Just tell the jury where your particular part of that office was with reference to where Mr. Bailey was.

334 A. Well, Mr. Bailey had his desk at the passenger station but he spent but very little time there; he kept all his personal papers or anything that was handled personally by him, he kept in that desk, but he spent a part of the time at the ticket office and part at the freight depot.

Q. Now we will say this is the railing, the building is long, runs this way.

A. Yes North and South.

Q. Parallel with the railroad track, now you come in here about the centre from the street?

A. The office is on the north end of the building.

Q. Now Mr. Bailey's wicket or railing run up here and then comes across to the north end of the building. Just tell the jury how that was formed.

A. The office is built about 40 feet square, built on the end of the ware house; this would represent the north side, on this corner is a lobby 12 or 14 feet square; in the southeast corner of the office there is a car clerk's desk and the lobby is cut off from the office by a counter, there is no wicket or anything, just a counter that opens over in the balance of the office.

Q. Mr. Bailey's desk, now was up in that end?

A. Just in the north side, in the centre of the room he had a small desk there, but he didn't use it, just a very small desk about the size of the one there.

Q. That's about where the door went in?

A. Well it would be down here, this would be the north and that east, south and west, the lobby of the office is about like this, the door of entrance about here, my desk was right in the northwest corner; Mr. Bailey's right there as I remember in the centre in front

of the window. All the cash transactions were carried on at this counter right here. I had an assistant in the office. His desk was right here. He generally made the deliveries over the counter that way, the cash I handled was only collected; I arranged for the settlements.

Q. You don't recollect seeing me there?

A. I do not remember you, no.

Q. You don't remember Mr. Robinson?

A. No I don't think I saw Mr. Robinson.

Q. You were not up at Mr. Gallagher's barn at all?

A. No sir I was not.

Q. You were not out at the track, at the races?

A. I was out one afternoon to the races, but not in connection with this matter.

Q. Mr. Bailey you say collected out at the track, or was it the clerk in the office?

A. It was Mr. Bailey that made the collection?

Q. He was agent?

A. He was agent, yes sir.

Q. Tell the jury again how these postings were made around there?

A. We had one on a bulletin board on the South side of the lobby; the bulletin board was on the south wall of the office, and we had one on that; and one on the side of the wall just over the counter where any one who came up there couldn't help but see it and also had one on the bulletin board in the ware house.

Q. Just had one in the lobby?

A. No sir, two in the lobby.

Q. What time were those postings made there?

A. What time were they?

Q. Yes sir, about what time of the year?

A. I don't know what time of the year. We had had them——

Q. You had had them there 4 or 5 months?

A. Longer than that I think.

Q. Longer than that?

A. Yes sir.

336 Q. Had them there—well you had them there—tacked them up well—and they had been there a long while had they not, under this western classification freight you speak of?

A. No sir, we put those up in compliance with circular issued by C. W. Cook, assistant freight agent, had charge of the tariff of the system at that time.

Q. Was it a year before this?

A. I couldn't say.

Q. You stated in reply to a question of Mr. Green's that the rate referred to there in the bill of lading was under what is known as the western classification?

A. I said we collected, based on less than car load rate, named in the western classification.

Q. That is the regular schedule rate under the western classification for less than car load rates?

A. It simply provided minimum to apply on less than car load rates.

Q. It was the regular rate controlled by the western classification, minimum, on all the roads members of that classification was it not?

A. Yes sir.

Q. Do you know that rate is agreed on—you know how they are agreed on?

A. Yes sir.

Q. Agreed on by the traffic men of each road are they not?

A. Yes sir.

Q. And then they are promulgated as the regular schedule rate to give all shippers and the agents themselves?

A. Yes sir.

Redirect examination for defendant by Mr. GREEN:

Q. The deposit was made with the understanding if there were any additional freight charges they were to be collected later on?

A. Yes sir, that was what I was informed when I returned, 337 when they turned the money over to me.

Recross-examination by Mr. SMITH:

Q. You didn't have any information at the time of the payment of the \$15.00 about what the charges were did you?

A. We couldn't—well as I said I was not present.

Q. You didn't have any means of knowing?

A. When I returned the money was turned over to me and the explanation made.

Q. You don't understand my question—you didn't have any means of knowing what the amount of freight *was* collectable at the time the \$15.00 was advanced did you?

A. Yes sir we could have told, if we had known what service had been accorded; whether a car had been ordered, or whether ordered as less than car load lot shipment.

Q. You had no notice from Kansas City?

A. No, we had no notice from them.

Q. They afterwards sent you this way bill which showed you what the freight was?

A. Yes sir.

Q. Did they send you that by mail or how did you get it?

A. I cannot say at this time I presume by mail. I will say in explanation on shipments of this kind out of Kansas City at night, they couldn't make the way bill in time to accompany the shipment.

Q. And they had to make it out the next day?

A. Yes sir, and mail them.

Q. You have seen the contract here—Mr. Green showed you the contract in this case?

A. I looked it over, yes sir.

Q. You are familiar with it?

A. Yes sir.

338 Q. It's a regular printed form the Santa Fe uses isn't it?

Objected to as incompetent, not proper cross examination?
Overruled. Exception.

A. Yes, sir, it's regular form 67.

Q. The printed form they send out for their agents to use in the freight shipments, isn't it?

Objected to as above.

Overruled. Exception.

A. Yes sir.

Q. There is no freight rate named in that there is there?

Same objection, contract itself is the best evidence.

Sustained.

Plaintiff excepts.

Q. Well, under that contract, it shows no contract is made in it; that a shipper can know the rate he is being charged in a case of this kind, if he is not informed by the clerk who makes out the way bill or presents him the contract of the rate of freight, and the way bill is not made out till after the shipment is made; the shipper wouldn't have any means of knowing what the rate of freight was unless the agent at the time would inform him of the rate of freight would he?

Defendant objects, incompetent, irrelevant and immaterial, not proper cross examination.

Overruled.

Exception.

A. He would not get it from the way bill in any case.

Q. He would have no means of knowing would he?

A. Not unless he inquired. If the way bill accompanied the shipment he couldn't have got any more information.

Q. If he hadn't inquired and the agent hadn't informed him he wouldn't know?

A. No sir.

339 Q. There is none specified in that contract is there?

Objected to as above.

Sustained. Exception.

Redirect examination by Mr. GREEN:

Q. He could examine the tariffs could he not and ascertain?

A. Yes sir, he could.

Recross-examination by Mr. SMITH:

Q. You required always didn't you on the Santa Fe at the time you were employed when a shipper made those shipments, before he could make the shipment that he must sign one of those contracts of a freight man?

Defendant objects as immaterial.

Overruled. Exception.

A. You mean we wouldn't accept a shipment to be forwarded without executing a live stock contract?

Q. Yes sir.

A. No sir, we would not do that.

Q. The shipper would be compelled to sign one before he got his shipment?

A. Before we accepted the shipment.

Q. Before he shipped his stuff away from your place at Lawrence, if a shipper came in and offered you horses to ship he couldn't ship those horses until he signed that bill could he?

A. Why we wouldn't accept it without his signing the contract, but he is not obliged to ship it, or release his shipment to any specified value, he can place any valuation he wants up to \$800.00.

Q. Now where the horses are loaded before and ready to go out and then a contract is brought to him for his signature, he would have no other choice than to sign it would he?

A. If he wanted the shipment to go forward he would; he wouldn't have to ship his horses at \$100.00 if he didn't want to.

Q. Does the shipper come in there and tell you to place that valuation at \$100.00 on it generally?

340 Objected to as immaterial.

Sustained. Exception.

Q. I will ask you if it's the custom, your custom in that office there on the Santa Fe to call the attention of shippers to the reduced rate or do you ever say anything to them about it unless they inquire?

Objected to incompetent, irrelevant and immaterial, not proper cross examination.

Overruled. Exception.

A. Well, sometimes we do and sometimes we don't; it depends, with a regular shipper, most of the live stock was shipped by regular shippers and it was generally understood that they released us because none of them wanted to pay the excess freight, but with an irregular shipper we would call their attention to these things.

Q. It was the customary contract that most everybody shipped under and it was the exception when they shipped under a higher rate wasn't it?; it is the regular contract of the average shipper who shipped horses is it not?

Objected to as above.

Overruled. Exception.

A. It is the regular contract, yes sir.

Q. Question repeated.

A. It is the regular contract and they usually elected to take the lower rate.

Q. It is the regular contract most people ship under, isn't it?

A. They all use the same contract, yes sir.

Q. You poked that out to them and they signed it without asking any questions, didn't they?

Objected to as above.

Overruled. Exception.

A. Well with a regular shipper they did, yes, but with
341 them we knew they understand the provisions of the con-
tract. To anyone who was not familiar with it we usually
explained it. We didn't read it all to them, but explained it and
made known what the contract was.

Q. Do you know whether they explained it in the office at Kan-
sas City or not?

A. I cannot say as to Kansas City, no sir.

Q. You didn't know Mr. Conway did you, the claim agent, is
Mr. Conway dead?

Objected to by defendant as not proper cross examination.

Sustained.

Exception.

342 Mr. GREEN: I would like to introduce in evidence the
certificate of Edward A. Mosely, Secretary of the Interstate
Commerce Commission with relation to that portion of tariff intro-
duced in evidence.

Plaintiffs object as heretofore to the introduction of any contracts
and rates.

Overruled. Exception taken.

Certificate as follows: *

"I, Edward A. Mosely, Secretary of the Interstate Commerce
Commission, do hereby certify that the schedules hereto attached
and more particularly hereinafter described, are true copies of
schedules (except as to stencil stamps on the title pages thereof)
filed with said Interstate Commerce Commission on dates specified
below:

The Atchison, Topeka & Santa Fe Railway "Santa Fe System"
Tariff No. 6180-D, I. C. C. No. 3465, filed on November 24, 1905.

Amendment No. 9 to said "Santa Fe System" Tariff No. 6180-D,
I. C. C. No. 3465, filed on May 17, 1906.

Amendment No. 12 to said "Santa Fe System" Tariff No. 6180-
D, I. C. C. No. 3465, filed on August 30, 1906.

Amendment No. 25 to said "Santa Fe System" Tariff No. 6180-D,
I. C. C. No. 3465, filed on June 10, 1907.

Amendment No. 31 to said "Santa Fe System" Tariff No. 6180-D
I. C. C. No. 3465, filed on August 23, 1907.

Amendment No. 42 to said "Santa Fe System" Tariff No. 6180-D
I. C. C. No. 3465, filed on May 12, 1908.

Amendment No. 43 to said "Santa Fe System" Tariff No. 6180-D
I. C. C. No. 3465, filed on June 25, 1908.

343 Amendment No. 44 to said "Santa Fe System" Tariff No.
6180-D, I. C. C. No. 3465, filed on July 30, 1908.

Amendment No. 45 to said "Santa Fe System" Tariff No. 6180-D,
I. C. C. No. 3465, filed on August 18, 1908.

Amendment No. 47 to said "Santa Fe System" Tariff No. 6180-D,
I. C. C. No. 3465, filed on October 24, 1908.

Amendment No. 48 to said "Santa Fe System" Tariff No. 6180-
D, I. C. No. 3465, filed on November 13, 1908.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 17th day of December, A. D. 1908.

[SEAL.]

EDWARD A. MOSELY,

Secretary of the Interstate Commerce Commission.

Exhibit "C."

344-446 MR. SMITH: Now comes the plaintiffs in this action and move the court to exclude all the testimony adduced on behalf of the witnesses inclusive of the record evidence, and the oral testimony, in reference to the written contract plead in the answer for the reason that the same is incompetent, irrelevant and immaterial, under the law enacted by Congress known as the Hepburn Act and under the laws of Missouri, where the contract was executed and plead by the defendant; and for further reason at this time that the evidence of the defendants showed that the Hepburn Act was not complied with and that the contract was not such a reduced rate as would sustain a limited liability contract under the laws of Missouri, and that the evidence shows no special contract with an agreed valuation of the mare in controversy was ever made or signed by anyone of the plaintiffs to this action; and the purported contract introduced in evidence in this case is not a contract that specifies a reduced rate on live stock as a consideration for such limited liability as can be sustained in law; and for the further reason that the evidence of the defendant shows at this time that the rate was the regular rate and not a special rate, and a limitation of liability and not agreed valuation and that the contract is void and invalid under the law and the issues in this case.

Motion overruled. Exception taken.

447 Whereupon the 19th day of April 1910, the court gives the Jury the following instructions: which Instructions is in words and figures as follows, to-wit:

448 In the District Court of Lincoln County, Oklahoma,

H. F. MOORE et al., Plaintiffs,

vs.

A., T. & S. F. R. R. Co., Defendant.

GENTLEMEN OF THE JURY:

This is an action brought by the plaintiffs to recover damages for injury alleged to have occurred on or about the 18th day of September 1907 between the City of Kansas City Missouri, and the city of Lawrence in the state of Kansas, over the line of the defendant railway, to the racing mare Sousa Mc. The plaintiffs in this action contend that the defendant undertook to transport the mare, Sousa Mc to the city of Lawrence from the city of Kansas City in a reasonable time and that she was being transported for the purpose on the part of the plaintiffs of racing her there in races.

That the defendant was guilty of negligence in that they left the mare in the yards at Kansas City or in the yards at Argentine near Kansas City, from about ten o'clock at night until the next morning, and that in moving the car about through its yards they handled the mare roughly and in such a manner that the tendons of her left leg, including the main tendon of her left leg and the suspensory ligaments thereof were so injured and damaged that her racing value was practically destroyed, and that she was thereafter unable to race and that her marketable value was greatly damaged and injured.

To this petition the defendants filed an answer denying that they were guilty of negligence and denying that the mare was injured

449 by its agents and servants in the manner claimed in plaintiff's petition; and the defendant- further set up in their answer that at the time of the shipment of said mare one of the plaintiffs in this action, C. E. Robinson, signed the name of H. F. Moore, another one of the plaintiffs in this action, to a contract in which contract the plaintiffs agreed that in consideration of a limitation of the value of the said mare in case of injury to a sum not exceeding one hundred — (\$100.00), that they were granted a reduced rate upon the mare; and that said reduced rate was less than the regular rate made and provided and published and posted by the defendant for the shipment of horses at their actual -ue.

The plaintiffs thereafter filed a reply denying that -s alleged in defendant's answer are true.

— leadings constitute the issues in this case, and you — that:

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Dep't.)

450

1.

If you find from the evidence in this case the mare, Sousa Me, was injured during the shipment by reason of the negligence of the defendant in roughly handling the car in which she was being shipped, and that the rough handling of the car in which she was being shipped was the proximate cause of the injuries which she is alleged to have received in her left leg, then your verdict shall be for the plaintiffs, unless you further find from the evidence that such injuries to said mare resulted from the inherent propensities or the vicious nature of the mare herself, and in that event your verdict shall be for the defendant.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Dep't.)

451

2.

If you find for the plaintiff- you are instructed that the measure of damage which plaintiffs have incurred is the difference between the market value of said mare at Lawrence Kansas, in the condition she was then in as a result of the negligence of the defendant, if

you find there was any negligence, and what she would have been worth in the market at said place and time in her uninjured condition, provided you find that the defendant or its agents knew of her destination at the time of said shipment.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Deft.)

452

3.

You are further instructed, gentlemen of the jury, that if you find from the evidence *that* in *this* case that the plaintiffs, Moore and Robinson, had leased the said mare for racing purposes during the season of 1907, and that by reason of the injuries to said mare, said plaintiffs, Moore and Robinson were damaged and caused to incur expense and pay out money for her racing engagements and money for her treatment and care, they would be entitled to recover such damage as you find from the evidence they have incurred due to such injuries.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Deft.)

453

4.

You are further instructed, gentlemen of the jury, that if you find from the evidence in this case that the plaintiffs, Moore and Robinson, had leased the mare in controversy for racing purposes during the year 1907, and that by reason of the injury to said mare, if any, that the said plaintiffs Moore and Robinson, were deprived of the profits that might have been made from said mare, in racing her for the remainder of the season of the year 1907, then you will find in favor of the plaintiffs Moore and Robinson for what the evidence in this case reasonably shows they were damaged from said cause.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Deft.)

454

5.

You are instructed that if you believe from the evidence that the plaintiffs informed defendant's agent at Lawrence, Kansas, of the injury to said mare, then you are instructed that no written notice would be required.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,
Att'y for Deft.)

455

6.

As to the contract pleaded by the defendants in their answer alleged by them to have been executed by the plaintiffs in this case, I instruct you as follows: That if you believe from the evidence that at the time of the shipment of the mare the contract of shipment was entered into between the plaintiff More or Robinson for the plaintiffs, and he, Moore or Robinson, represented to the defendant or its agents at Kansas City, that the value of said mare did not exceed one hundred dollars, and that the defendant through its agents at Kansas City, relied on said representation of value so made, and granted by reason thereof, to the plaintiff, a rate less than the regular rate for this class of shipments, on said mare, and was misled by said misrepresentation of plaintiffs as to the value of said mare, in fixing said rate, and were induced to fix a lower rate than the regular rate, if you find there was a lower rate fixed on said mare than the regular rate, then you are instructed that if you find the defendant guilty of negligence, and that such negligence was the proximate cause of the mare's injury, you are limited in your finding one thousand eight hundred and ninety dollars.

But if you find that representations of the value of said mare was not made by the plaintiff or their agents, but that the same was arbitrarily inserted by the defendant or its agent at Kansas City, or printed in said contract when the plaintiff Moore's name was signed to it, you are instructed that plaintiffs are not bound by the limitation of one hundred dollars, and you will find the 456 actual damage which plaintiffs have incurred by reason of the injuries to said mare, if any, not exceeding the sum of one one thousand eight hundred and ninety dollars.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,

Att'y for Def't.)

457

7.

You are instructed that by proximate cause is meant that moving and efficient cause without which the injury would not have occurred.

(Defendant excepts to the giving of the above instruction.

GEO. M. GREEN,

Att'y for Def't.

458

8.

You are instructed that the burden of proff is upon the plaintiff to establish by a preponderance of the evidence that he was entitled to recover at the time of the filing of this suit. And by a preponderance of the evidence is not necessarily meant the greater number of witnesses, but by a preponderance of the evidence is meant that evidence which in the light of all of the facts and circumstances appearing upon trial, is entitled to the greater weight and credit.

459

9.

You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses, but you are bound by the law as given to — by the court in these instructions. And, in determining the weight and credit that should be given to the testimony of any witness you may take into consideration his appearance upon the witness stand and in the presence of the Court and Jury; his manner of testifying; his apparent candor and fairness or lack of the same; his intelligence or lack of intelligence, his relation to the parties, his opportunities or lack of opportunity for seeing and knowing the facts about which he testifies; his interest or lack of interest in the result of this action; and together with all of the other facts and circumstances appearing upon the trial, determine the weight and credit that should be given to the testimony of any witness and give credit accordingly.

460

10.

And in the event that you find any witness has wilfully testified falsely relative to any material matter in issue, you are at liberty to disregard the whole of such witness' *es* testimony, except in so far as the same may be corroborated by other credible testimony, or by other facts and circumstances appearing upon the trial.

461

11.

You are further instructed that you must consider these instructions all together. You have no right to consider any part or parts of the same to the exclusion of other portions thereof.

462

12.

When you shall have retired to your jury room you will select one of your number as foreman, and when you have all agreed upon a verdict he will sign it as such, and you will all return with your verdict into Court.

463

13.

You are instructed, however, that a conclusion may be reached by a concurrence of nine or more of your members, and in the event you reach a verdict by a concurrence of nine or more of your number, but less than your whole number, then each juror agreeing to the verdict must sign his name to the same, and you will all return with the same into Court.

After the argument of counsel, forms of verdict will be handed you by the Court.

JOHN J. CARNEY, *Judge.*

Endorsements on back of instructions to jury: No. 2807. Ent H. F. Moore, vs. A., T. & S. F. R. R. Filed April 19, 1910. D. J. Norton, Clerk District Court, Lincoln County, Okla.

464 Thereafter on the 19th day of April, 1910, the plaintiffs requested the following instructions to be given, which Instructions are in words and figures as follows, to-wit:

465 In the District Court of Lincoln County, Oklahoma.

H. F. MOORE et al., Plaintiffs,
vs.
A., T. & S. F. R. R. Co., Defendant.

GENTLEMEN OF THE JURY:

This is an action brought by the plaintiffs to recover damages for injury alleged to have occurred on or about the 18th day of September 1907, between the city of Kansas City, Missouri, and the City of Lawrence in the State of Kansas, over the line of the defendant railway, to the racing mare, Sousa Mc. The plaintiffs in this action contend that the defendant undertook to transport the mare Sousa Mc to the city of Lawrence from the city of Kansas City in a reasonable time and that she was being transported for the purpose on the part of the plaintiffs of racing her there in the races. That the defendant was guilty of negligence in they left the mare in the yards at Kansas City or in the yards at Argentine near Kansas City, from about ten o'clock at night until the next morning, and that in moving the car about through its yards they handled the mare roughly and in such a manner that the tendons of her left leg, including the main tendon of her left leg and the suspensory ligaments thereof, were so injured and damaged that her racing value was practically destroyed, and that she was thereafter unable to race and that her marketable value was greatly damaged and injured.

To this petition the defendants filed an answer denying that they were guilty of negligence and denying that the mare 466 was injured by its agents and servants in the manner claimed

in the plaintiffs' petition and the defendants further set up in their answer that at the time of the shipment of said mare one of the plaintiffs in this action, C. E. Robinson, signed the name of H. F. Moore, another one of the plaintiffs in this action, to a contract in which contract the plaintiffs agreed that in consideration of a limitation of the value of said mare in case of injury to a sum not exceeding One Hundred Dollars (\$100.) that they were granted a reduced rate upon the mare and that said reduced rate was less than the regular rate made and provided and published and posted by the defendant for the shipment of horses at their actual value. The plaintiffs thereafter filed a reply denying that the facts as alleged in plaintiffs' answer — true. These pleadings constitute the issues in this case, and you are instructed that:—

467 First. That if you find from the evidence in this case that the mare, Sousa Mc, was injured during the shipment by reason of negligence of the defendant in roughly handling the car in which she was being shipped, and that the rough handling of the

car in which she was being shipped was the proximate cause of the injuries which she is alleged to have received in her left leg, then your verdict shall be for the plaintiffs, unless you further find from the evidence that such injuries to said mare resulted from the inherent propensities of the vicious nature of the mare herself; then in that event, your verdict shall be for the defendant.

Given.

CARNEY, *Judge.*

468 Second. If you find for the plaintiff, you are instructed that the measure of damages which plaintiffs have incurred is the difference between the market value of said mare at Lawrence, Kansas, in the condition she was then in as a result of the negligence of the defendant, if you find there was any negligence, and what she would have been worth in the market at said place and time in her uninjured condition, provided you find that the defendant or its agents knew of her destination at the time of said shipment.

Given.

CARNEY, *Judge.*

469 3. You are further instructed, gentlemen of the jury, that if you find from the evidence that in this case that the plaintiffs, Moore and Robinson, had leased the said mare for racing purposes during the season of 1907, and that by reason of the injuries to said mare said plaintiffs, Moore and Robinson were damaged and caused to incur expense and pay out money for her racing engagements and money for her treatment and care, they would be entitled to recover such damage as you find from the evidence they have incurred due to such injuries.

Given.

CARNEY, *Judge.*

470 4. As to the contract pleaded by the defendants in their answer alleged by them to have been executed by the plaintiffs in this case, I instruct you as follows: That if you believe from the evidence that at the time of the shipment of the mare the contract of shipment was entered into between the plaintiff Moore or Robinson, for the plaintiffs, and he, Moore or Robinson, represented to the defendant or its agents at Kansas City that the value of said mare did not exceed One Hundred dollars, and that the defendant through its agents at Kansas City relied on said representation of value so made, and granted by reason thereof, to the plaintiff, a rate less than the regular rate for this class of shipments, on said mare, and was misled by said misrepresentation of plaintiffs as to the value of said mare, in fixing said rate, and were induced to fix a lower rate than the regular rate, if you find there was a lower rate fixed on said mare, than the regular rate, then you are instructed that if you find the defendant guilty of negligence, and that such negligence was the proximate cause of the mare's injury you are limited in your findings to the sum of one hundred dollars.

But if you find that representation of value of said mare
471 was not made by the plaintiff or their agents, but that the same was arbitrarily inserted by defendant or its agent at

Kansas City, or printed in said contract when the plaintiff Moore's name was signed to it, you are instructed that plaintiffs are not bound by the limitation of one hundred dollars, and you will find the actual damage which plaintiffs have incurred by reason of the injuries to said mare, if any, not exceeding the sum of one thousand eight hundred and ninety dollars.

472 5. You are instructed that by proximate cause is meant that moving and efficient cause without which the injury would not have occurred.

Given.

CARNEY, *Judge.*

473 6. You are instructed that the burden of proof is on the plaintiff- in this case and that they must make out their case by preponderance of evidence.

Given.

CARNEY, *Judge.*

474 7. You are instructed that under the laws of this state that nine of your number may return a verdict, and you are further instructed that if you all agree on a verdict the verdict so agreed upon may be signed by the foreman, but if less than twelve agree upon a verdict, the verdict must be signed by those agreeing to the verdict.

Endorsements on back of instructions: No. 2807. Ent. In the District Court of Lincoln County, Oklahoma. Plaintiff- Requested Instructions, H. F. Moore et al., vs. A. T. & S. F. R. R. Co. Instructions. Filed Apr. 19, 1910. D. J. Norton, Clerk District Court, Lincoln County, Okla.

475 Thereafter on the 19th day of April 1910, the defendant requested the following instructions to be given, which instructions are in words and figures, as follows, to-wit:

476 In the District Court of Lincoln County, State of Oklahoma

H. F. MOORE et al., Plaintiffs,
vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Defendant's Requested Instructions.

Comes now the defendant in the above entitled action and requests the court to give to the jury the following instructions numbered from one to five, inclusive.

COTTINGHAM & BLEDSOE,
GEO. M. GREEN,
Attorneys for Defendant.

Instruction No. 1.

The jury are instructed in this case that the plaintiff has failed to prove a cause of action in favor of the plaintiff and against the defendant. You shall, therefore, return your verdict in favor of the defendant.

Refused, and Excepted to.

CARNEY, *Judge.*

Instruction No. 2.

The jury are instructed that under the pleadings and evidence in this case, that the horse was shipped upon a written contract of shipment to the defendant's answer and marked "Exhibit A," and that there can be no recovery had in this case for more than \$100.00, even though the jury find from the evidence that said horse was injured through the negligence of the defendant.

Refused, and Excepted to.

CARNEY, *Judge.*

Instruction No. 3.

The jury are instructed that under the pleadings and evidence in this case the shipment of horses in question was made upon the written contract of shipment, which contract of shipment provided:

"In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim and loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous loading thereof for shipment the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to the consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with

the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice

480 herein provided for cannot and shall not be waived by any person except a general officer of the company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the company within ninety-one days after the same may have occurred."

And if the jury find from the evidence that no notice in writing of the loss or damage to the horses of the plaintiff was given to the

agent at Lawrence Kansas, as provided by said contract, then there can be no recovery in this case.

Refused and excepted to.

JOHN J. CARNEY, *Judge.*

481

Instruction No. 4.

The jury are instructed that from the pleading and evidence in this case the horse of plaintiff was transported from Kansas City to Lawrence, Kansas, under and by virtue of a written contract; that said contract embodied all the terms for transportation of said horse and that said contract provided, among other things, that a claim in writing should be given to the agent at Lawrence, Kansas, before any liability could exist on the part of the defendant for the loss or damage to said horse and before the plaintiff could sue for such loss or damage.

That the filing of said claim, as provided by the contract is a condition precedent to the right of plaintiff to recover in this case, and if the jury find from the evidence that no such notice in writing was given or filed with the agent of the defendant at Lawrence, then there can be no recovery in this case.

Refused and excepted to.

JOHN J. CARNEY, *Judge.*

482

Instruction No. 5.

The jury are further instructed that from the pleading and evidence in this case the plaintiff's horse was transported from Kansas City, Mo., to Lawrence, Kansas, under and by virtue of the written contract of shipment attached to the defendant's answer, marked "Exhibit A," and by the terms of said contract the plaintiff represented and agreed that the live stock in question did not exceed in value the sum of \$100.00, it being understood that the rate of freight given was based upon such limit of valuation and which was the highest value accepted for the lower rate, (animals of a higher value being charged a higher rate, and case of loss or damage from any cause for which the Company may be liable, payments shall be made therefor only on the basis of the actual value at the time and place of shipment and in no case to exceed the sum of \$100.00. And the defendant could not be liable in any event for more than said sum in case of loss or damage to said horses whether said loss occurred from the negligence of the defendant or not. The plaintiff cannot recover in this case more than \$100.00, even though the jury find from the evidence that the defendant negligently caused the injury to said horse.

Refused and excepted to.

CARNEY, *Judge.*

Endorsements on back: No. 2807. Ent. Defendant's Requested Instructions. In the District Court of Lincoln County, Okla. H. F. Moore et al. vs. A., T. & S. F. R. R. Co. Filed Apr. 19, 1910. D. J. Norton, Clerk District Court, Lincoln County, Okla.

483 Whereupon the 19th day of April 1910, the plaintiffs filed their Exceptions to the Instructions given by the court, which Exceptions are in words and figures as follows, to-wit:

484 You are instructed that the contract as introduced in evidence and pleaded by the defendant, limiting the value of said mare to one hundred dollars is void in this respect, and excluded from your consideration.

Refused, and excepted to.

JOHN J. CARNEY, *Judge.*

Comes now the plaintiff- and excepts to the refusal of the court to give the above instruction, April 19, 1810.

H. H. SMITH,
Atty for Plaintiffs.

Endorsements on back Exceptions to Instructions: No. 2807. Ent. In the District Court of Lincoln County, Oklahoma. H. T. Moore, et al., vs. A., T. & S. F. R. R. Co. Bill of Exceptions. Filed April 19, 1810. D. J. Norton, Clerk of District Court, Lincoln County, Okla.

485 Thereafter on the 19th day of April 1910, the defendant filed its Exceptions to Instructions given by the court, which Exceptions are in words and figures as following, to-wit:

486 In the District Court of Lincoln County, Oklahoma.

H. T. MOORE et al.
vs.
A., T. & S. F. R. R. Co.

Comes now the defendant and excepts to the instructions of the Court to the Jury so given by the Court to the jury, and to each and every of said instructions.

The defendant further excepts to the failure of the court to give to the jury instructions 1 to 5, inclusive, requested by defendant.

GEO. M. GREEN,
Atty for Defendant.

Exceptions allowed.

JOHN J. CARNEY, *Judge.*

Endorsements on back of Exceptions to Instructions: No. 2807. Ent. Moore vs. A., T. & S. F. R. R. Co. Exceptions to Instructions. Filed Apr. 19, 1910. D. J. Norton, Clerk. District Court Lincoln County, Okla.

487 Whereupon the 19th day of April 1910, the Jury returned into open court their verdict in favor of the Plaintiffs which verdict is in words and figures as follows, to-wit:

488 Be it remembered, That on this 19th day of April 1910, the District Court of Lincoln County, State of Oklahoma, convened in regular session in the District Court Room at Chandler, in said County and State, pursuant to law. Present and presiding the Honorable John J. Carney, Judge; also present, D. J. Norton, Clerk; John J. Davis, County Attorney; and L. E. Martin, Sheriff; and W. L. Ducker, and Lucy Adams, Court Reporters; and public proclamation of the convening of said court having been made, and said court having been opened in due form of law, the following proceedings were had, to-wit:

STATE OF OKLAHOMA,
Lincoln County, ss:

In the District Court of the Tenth Judicial District, Sitting in and for said County and State.

No. 2807.

H. F. MOORE et al., Plaintiffs,
vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO., Defendant.

Verdict.

We the jury duly empaneled and sworn to try the above cause, do, upon our oaths find for the plaintiffs and assess the amount of their recovery at Fourteen Hundred Dollars (\$1,400.00).

J. M. GARDNER, *Foreman.*

489 Whereupon the 21st day of April 1910, the defendant filed its motion for a New Trial, which Motion is in words and figures as follows, to-wit:

490 In the District Court of Lincoln County, Oklahoma.

No. 2807.

F. H. MOORE et al., Plaintiffs,
vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant above named and moves the court to set aside the verdict of the Jury herein and to grant to the defendant a new trial herein upon the grounds and for the following reasons, to-wit:

First. Because of the excessive damages appearing to have been given under the influence of passion or prejudice;

Second. Because of error in the assessment of the amount of recovery, the same being too large;

Third. Because the verdict of the Jury is not sustained by sufficient evidence;

Fourth. Because the verdict of the Jury is contrary to law;

Fifth. Because of errors of law occurring at the trial and excepted to by the defendant at the time;

Sixth. Because over the objection of the defendant at the time the court admitted certain irrelevant, incompetent and immaterial testimony, to which the defendant at the time duly excepted and still excepts;

Seventh. Because the Court refused to admit certain relevant, competent and material testimony offered by the defendant and to which ruling of the court, the defendant at the time duly excepted and still excepts;

Eighth. Because the Court erred in its instructions to the Jury, to the giving of which instructions the defendant at the time duly excepted and still excepts;

491 Ninth. Because the Court misdirected the jury as to matters of law, to which instructions of the court the defendant at the time duly excepted and still excepts;

Tenth. Because the Court erred in refusing to give to the jury the special instructions requested by the defendant, numbered one to seven inclusive, to which refusal of the court the defendant at the time duly excepted and still excepts;

Eleventh. Because the court erred in overruling the objection of the defendant to the introduction of any evidence by the plaintiff at the beginning of the trial, to which action of the court, the defendant at the time duly excepted and still excepts;

Twelfth. Because the court erred in overruling the motion of the defendant to render judgment upon the pleadings, to which ruling of the court the defendant at the time duly excepted and still excepts;

Thirteenth. Because the court erred in overruling the demurrer of the defendant at the conclusion of plaintiffs' evidence, to which ruling of the court the defendant at the time duly excepted and still excepts;

Fourteenth. Because the court erred in overruling the Motion of the defendant at the conclusion of the testimony for the court to instruct the jury to return a verdict for the defendant, to which ruling of the court, the defendant at the time duly excepted and still excepts;

Fifteenth. Because the court erred to the prejudice of the defendant in construing the Interstate Commerce Act as not only destroying the validity of a contract made for transportation at published rates, but in holding that the same destroyed all rights of compensation, and that said tariff so filed in accordance with the Interstate Commerce Act was not binding and conclusive upon the plaintiff as to the contract of shipment entered into between

492 plaintiff and defendant at the time; to which ruling of the court, the defendant excepted at the time and still excepts;

Sixteenth. Because the Court erred in its construction of said

Interstate Commerce Act in holding that a reduced rate of freight in consideration of the shipment being valued at a specific amount discharged the shipper from liability to said specific amount and in holding that the shipper was not bound by the terms and conditions of said tariff so filed with the Interstate Commerce Commission and on file at the depot of this defendant at Kansas City, Missouri; to which ruling of the court, the defendant at the time duly excepted and still excepts.

COTTINGHAM & BLEDSOE,
GEO. M. GREEN,
Attorneys for Defendant.

Endorsements on back of Motion for New Trial: No. 2807. Ent. In the District Court of the County of Lincoln, Oklahoma, F. H. Moore et al., Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Company, Defendant. Motion for New Trial. Filed April 21, 1910. D. J. Norton, Clerk District Court, Lincoln County, Okla.

493 Whereupon the 30th day of April 1910, the court overrules the defendant's motion for new trial, which ruling of the court is in words and figures as following, to-wit:

494 State of Oklahoma, Tenth Judicial District, Lincoln County.

No. 2807.

H. F. MOORE et al., Plaintiff,
vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Order Overruling Motion for New Trial.

Now at this time, the motion filed by the defendant in the above entitled — to set aside the verdict rendered therein and grant defendant a new trial in said action, coming on for hearing and the Court having heard the Attorneys for defendant in favor of said motion, and the attorneys for the plaintiff opposing the same, and the court having considered the same and being fully advised in the premises, finds that said motion is not well taken and ought to be denied;

It is therefore on motion of the Attorney for the plaintiff ordered and adjudged that said motion for new trial, be, and is hereby overruled and denied, to which ruling the defendant excepts, which exception is allowed.

And now upon application of the defendant, it is ordered that said defendant be, and is hereby granted an extension of sixty days' time in which to prepare and serve a case made upon plaintiff's Attorneys; plaintiff to have ten days thereafter in which to suggest amendments and serve the same upon counsel for defendant, and the case made and amendments shall upon five days' notice by either

party be submitted to the Judge who tried the cause to be settled and signed.

It is further ordered that defendant file its petition in error in the Supreme Court within One hundred and twenty days from this date, and that it file its undertaking and appeal within thirty days from this date, in the sum of twenty six hundred dollars 195 (\$2,600.00), execution being stayed in the meantime, and that upon the filing of said undertaking, all proceedings and execution of said judgment be, and are hereby stayed pending the expiration of the time for filing its petition in error in the Supreme Court.

Done in open Court, at the City of Chandler, Oklahoma, this 30th day of April, 1910.

By the Court.

JOHN J. CARNEY,
Judge of Said Court.

Endorsements on back of order overruling motion for new trial: No. 2807. Ent. In the District Court, Lincoln County, Oklahoma. H. F. Moore, et al., vs. A., T. & S. F. R. R. Co. Order Overruling Motion for New Trial. Filed April 30, 1910. D. J. Norton, Clerk District Court, Lincoln County, Oklahoma.

496 Whereupon the 30th day of April, 1910, a Journal Entry of Judgment was filed in said cause, which Journal Entry of Judgment is in words and figures as follows, to-wit:

Be it remembered that on this 19th day of April 1910, 497 the District Court of Lincoln County, State of Oklahoma, convened in regular session in the District Court Room at Chandler, in said County and State, pursuant to law. Present and presiding the Honorable John J. Carney, Judge; also present, D. J. Norton, Clerk; John J. Davis, County Attorney; and L. E. Martin Sheriff; and Lucy Adams and W. L. Ducker, Court Reporters; and public proclamation of the convening of said court having been made, and said court having been opened in due form of law, the following proceedings were had, to-wit:

In the District Court of Lincoln County, Oklahoma.

No. 2807.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

Be it remembered that on this 19th day of April 1910, that being one of the regular *judicial* days of the April 1910 term of the District Court sitting in and for Lincoln County, State of Oklahoma, and

that being the day upon which this cause stood for trial upon the dockets of said court, said cause came on for trial. The plaintiffs appeared in person and by their attorneys, H. H. Smith and Rittenhouse & Rittenhouse, and the defendant appeared by its attorneys, Cottingham & Bledsoe, George M. Green and Emery A. Foster. Wherein plaintiffs filed a petition and an amended petition in said cause asking for damages to one Sousa Me, a race horse, caused through negligence of the defendant while carrying said horse from Kansas City Missouri, to Lawrence, Kansas, on or about the 17th day of September 1907. To which petition defendant filed an answer denying each and all of the allegations in plaintiffs' petition contained, and as affirmative defense they set up a certain live stock contract and plead the laws of the State of Missouri and the laws of Kansas and an amended petition setting up the laws of the United States known as the Hepburn Act and that the shipment was an interstate shipment and that the laws of the United States governed said shipment and controlled same. Whereupon plaintiff demurred to the same and both the plaintiffs and defendant announced ready for trial and a jury was by the court called, selected and empaneled, sworn and chosen to try the above cause according to law and the evidence therein, which said jury consisted of J. M. Gardner and eleven other good men and thereupon defendant offered to amend its original answer by striking certain portions of the same, and filed a motion for judgment for the defendant on the pleadings, both of which motions the court overruled. Thereupon the plaintiffs proceeded with their opening statements and defendant with its opening statement and thereupon demurred to the evidence of the plaintiffs, which demurrer to evidence was by the court overruled and exception taken by defendant. Thereupon the defendant introduced its evidence and rested, and thereafter plaintiffs introduced evidence in rebuttal. Whereupon the court instructed the jury in writing and limited the argument of counsel to thirty minutes on each side; and after argument of counsel the jury — conducted to the jury room under the care of the bailiff where they considered of the case and returned into court the following verdict, *to-wit*:

499 STATE OF OKLAHOMA,
County of Lincoln, ss:

District Court of the Tenth Judicial District, Sitting in and for said County and State.

No. 2807.

H. F. MOORE et al., Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

We, the jury empaneled and sworn to try the above cause do upon our oaths, find for the plaintiffs and assess the amount of their recovery at Fourteen Hundred Dollars (\$1,400.00).

J. M. GARDNER, Foreman.

Whereupon said verdict was read in open court and the jury asked if it was their verdict. To which they responded that it was. Thereupon said verdict — accepted by the court and the Clerk ordered to file same.

It is therefore considered, ordered and adjudged by the court that the plaintiffs, H. F. Moore, C. E. Robinson and S. H. Smith do have and recover of and from the defendant, The Atchison, Topeka & Santa Fe Railway Company, the sum of Fourteen Hundred Dollars (\$1,400.00) with interest at 6% per annum from the 19th day of April, 1910, and costs of this suit.

Said defendant having filed a motion for a new trial and same having been heard and overruled, said defendant *are* hereby given twenty days to file an appeal bond to stay execution, and execution is staid until the said bond is filed, and sixty days to make and serve a Case Made, ten days to suggest amendments and five days to settle and sign same and one hundred and twenty days to file their petition in error in the Supreme Court of the State of Oklahoma.

500 Whereupon the 30th day of April, 1910, additional Journal Entry of Judgement was filed in said cause, which Journal Entry is in words and figures, as follows, to-wit:

501 STATE OF OKLAHOMA,
Lincoln County, ss:

In the District Court Thereof, in and for the Tenth Judicial District

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Plaintiffs,
vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Judgement.

At a general term of the District Court in and for Lincoln County, State of Oklahoma, begun and held at the court house in the City of Chandler, in said County and on the 19th day of April.

Present, Honorable John J. Carney, special presiding Judge.

This action being at issue was thereupon called and tried before the Court and a jury of twelve men and the allegations and proofs on the part of the plaintiffs having been heard and considered and the allegations of the defendant and the proofs in support of the same having been heard and considered, and the issues as thus made up and joined having been tried to the jury under the instructions of the Court, and a general verdict for the plaintiffs having been duly rendered on the 19th of April, 1910, into open court, which is in words and figures, to-wit:

STATE OF OKLAHOMA,
Lincoln County, ss:

District Court of the Tenth Judicial District, Sitting within and for
 said County and State.

No. 2807.

H. F. MOORE et al., Plaintiffs,
 vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
 Defendant.

Verdict.

502 We, the jury empaneled and sworn to try the above cause, do upon our oaths, find for the plaintiffs, and assess the amount of their recovery at Fourteen Hundred Dollars (\$1,400.00).

J. M. GARDNER, *Foreman.*

which said verdict is received and by the order of the Court filed.

Now on motion of H. H. Smith and Rittenhouse & Rittenhouse, Attorneys of record for said plaintiffs, it is adjudged and ordered that said plaintiffs recover of said defendant, The Atchison, Topeka & Santa Fe Railway Company, Fourteen Hundred Dollars found by the jury, with interest at the rate of six per cent per annum from the 19th day of April, 1910, and the costs of this action, for the sum of \$— Dollars; and have judgement for the sum of Fourteen hundred dollars, and interest at six per cent from the 19th day of April, A. D. 1910, and for costs in the sum of \$ — Dollars, for which plaintiffs shall have execution.

By the Court.

JOHN J. CARNEY, *Judge.*

Endorsements on back of Journal Entry: No. 2807. Ent. Moore, et al. vs. A., T. & S. F. R. R. Co. Journal Entry (Judgement). Filed April 30, 1910. D. J. Norton, Clerk District Court, Lincoln County, Oklahoma.

503 Whereupon the 9th day of May 1910, the defendant filed its Supersedeas Bond, which is in words and figures as follows, to-wit:

504 In the District Court of Lincoln County, State of Oklahoma

H. F. MOORE et al., Plaintiffs,
vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Supersedeas Bond.

Know all men by these presents: That Whereas, the above named plaintiff did on the 19th day of April, A. D. 1910, in the above entitled action in the above named court procure a judgement against the above named defendant for the sum of Fourteen hundred Dollars (\$1,400.00) and for the further sum of \$—, costs of said action; and

Whereas, the above named defendant desires to appeal from said judgement to the Supreme Court of the State of Oklahoma;

Now, Therefore, we the undersigned, The Atchison, Topeka & Santa Fe Railway Company, as principal, and U. C. Guss, of the county of Logan, State of Oklahoma and, the National Surety Company of New York, as sureties, are held and firmly bound unto the above plaintiff in the penal sum of Twenty-six Hundred (\$2,600.00) Dollars, that said defendants will prosecute its appeal to effect and without any unnecessary delay and will pay any judgement and costs which may be awarded against it on said appeal.

In witness whereof, we have hereunto set our hands this
505 6th day of May, 1910.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

By COTTINGHAM & BLEDSOE,
GEO. M. GREEN,

Its Attorney, Principal.

M. W. NESS,

[SEAL.] NATIONAL SURETY CO.,

By A. E. JOHNSON, *Its Attorney in fact,*
Sureties.

Endorsements on back of supersedeas bond: No. 2807. Ent. In the District Court of Lincoln County, State of Oklahoma. H. F. Moore, et al., Plaintiffs, vs. The Atchison, Topeka and Santa — Railway Company, Defendants. Supersedeas Bond. Filed May 9, 1910, D. J. Norton, Clerk District Court, Lincoln County, Okla. Approved May 9, 1910, D. J. Norton, Clerk.

506 Whereupon the 30th day of June 1910, there was filed Order Extending Time To Make and Serve Case-Made, which order of the Court is in words and figures as follows, to-wit:

507 In the District Court of Lincoln County, State of Oklahoma.

No. 2807.

H. F. MOORE, C. E. ROBINSON, AND S. H. SMITH, Plaintiffs.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant.

Order Extending Time to Make and Serve Case-made.

And, to-wit, on this the 28th day of June 1910, this cause comes on for hearing upon the application of the defendant for an extension of time in which to make and serve, case-made herein, and upon good cause being shown and appearing.

It is ordered that said defendant be, and is hereby granted sixty days in addition to the time already granted within which to make and serve case-made in said cause, with ten days to the plaintiffs herein to suggest amendments thereto; said case-made to be settled and signed upon five days' notice in writing upon either party to the other.

It is further ordered that the time within which said case-made and petition in error to be filed in the Supreme Court of the State of Oklahoma, is also extended sixty days in addition to the time already granted.

ROY HOFFMAN, Judge.

Endorsements on back of order: No. 2807. Ent. In the District Court of Lincoln County, State of Oklahoma. H. F. Moore, C. E. Robinson and S. H. Smith, Plaintiffs, vs. The Atchison, Topeka and Santa Fe Railway Company, Defendant. Order Extended Time to Make and Serve Case-Made. Filed June 30, 1910. D. J. Norton, Clerk.

508 Be it further remembered that the above and foregoing is all of the evidence taken upon the trial and introduced in said cause, both on the part of the defendant and plaintiff, and the foregoing is all of the evidence introduced and taken in the trial of said cause.

509 STATE OF OKLAHOMA,
County of Lincoln, ss:

I, D. J. Norton, Clerk of the District Court of said County and State, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled case.

In Witness Whereof, I have hereunto set my hand and seal of said court this the 15th, day of September 1910.

[SEAL.]

D. J. NORTON, Clerk.

Certificate of Attorneys.

No. 2807.

H. F. MOORE et al., Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., Defendant.

We hereby certify that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case made.

Witness our hands this 25th day of August 1910.

COTTINGHAM & BLEDSOE,
GEO. M. GREEN,

Attorneys for Defendant.

Acceptance of Service.

STATE OF OKLAHOMA,

Lincoln County, ss:

We, the undersigned attorneys for the plaintiffs in the foregoing suit, certify that the foregoing case made was duly served on us this 25th day of August A. D. 1910.

H. H. SMITH,
Attorneys for Plaintiffs.

The plaintiff has no amendments to suggest.

H. H. SMITH,
Atty for Plaintiff.

Sept. 3, 1910.

H. F. MOORE, C. E. ROBINSON, AND S. H. SMITH, Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Notice of Setting and Signing Case-made.

You are hereby notified that on the 12th day of September, 1910, at nine o'clock A. M., or as soon thereafter as counsel can be heard the case-made will be presented to the Honorable J. J. Carney at

his chambers in Oklahoma City for settling and signing; that said case-made will be presented for settling and signing at the time or as soon thereafter as counsel can be heard.

COTTINGHAM & BLEDSOE,
GEO. M. GREEN,
Attorneys for Defendant.

Service of the above notice is hereby accepted this 3rd day of September 1910, and I hereby waive my suggestions of amendments and agree that said case-made may be settled and signed at the time without further notice.

H. H. SMITH,
Attorney for Plaintiffs.

518-517

Certificate of Trial Judge.

This is to certify that the foregoing case-made was presented to me as the case-made in the above entitled action, the plaintiff appearing by H. H. Smith his attorney, the defendant appearing by Geo. M. Green, one of its attorneys, and it appearing to the court the plaintiff has no suggestions or amendments and that said Attorney of record for the plaintiff has agreed that said case-made may be settled and signed at any time. I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the clerk of said Court.

That I further certify that the above and foregoing case-made has been duly served, in due time, and that the Attorney for plaintiff has waived any suggestions or amendments and the same is duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth and as corrected by me is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgement had in said cause and I hereby settle, allow and certify and sign the same as true and correct, and I hereby order that the Clerk of the District Court of Lincoln County attest the same with the seal of said court and file the same of record.

Witness my hand at Oklahoma City this 12th day of September, A.D. 1910.

JOHN J. CARNEY, *Judge.*

Attest:

[SEAL.] D. J. NORTON.

Filed in the District Court of Lincoln County, State of Oklahoma this 15 day of September, 1910.

D. J. NORTON,
Clerk District Court, Lincoln County.

518-522 And thereafter, to-wit: On the 23rd day of October, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1912, October 23rd, 1912,
Nineteenth Judicial Day.

2016.

A., T. & S. F. Ry. Co., Plaintiff in Error,
vs.
H. F. MOORE et al., Defendant in Error.

And now this cause comes on for final decision and determination
by the court upon the record and briefs filed herein.

And the court having considered the same finds, that the judg-
ment of the court below in the above cause should be affirmed.

Opinion by Harrison, C.

By the COURT: It is so ordered, the above opinion is hereby
adopted in whole, and judgment entered accordingly.

523 And thereafter, to-wit: on the 24th day of December
1912, in the Supreme Court of the State of Oklahoma, the
following proceedings were had in said cause:

Supreme Court, December Term, 1912, December 24th, 1912,
Eleventh Judicial Day.

2016.

A., T. & S. F. Ry. Co., Plaintiff in Error,
vs.
H. F. MOORE, Defendant in Error.

And now on this day it is ordered by the court that the petition
for rehearing filed herein, be, and the same is hereby denied.

524 In the Supreme Court of the State of Oklahoma.

Certificate of Clerk.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State
of Oklahoma, do hereby certify that the foregoing 523 pages, num-
bered from 1 to 523, both inclusive, are a full, true and comple-
te transcript of the record and all proceedings in said Supreme Court
in cause No. 2016, The Atchison, Topeka & Santa Fe Railway
Company, Plaintiff in Error, versus H. F. Moore, C. E. Robinson
and S. H. Smith, Defendants in Error, as the same remain on file
and of record in my office.

In Witness Whereof, I hereto set my hand and affix the seal of
said Supreme Court, at the City of Oklahoma, this 27th day of Jan-
uary, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, Deputy.

525 In the Supreme Court of the United States.

No. 965.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON, and S. H. SMITH, Defendants in
Error.*Statement of Errors, and Part of Record to be Printed.*

Comes now The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error herein, and files with the Clerk of this Court a statement of the errors on which it intends to rely, and hereby designates the parts of the record to be printed, which it thinks necessary for the consideration of this court, and designates the parts of the record to be omitted.

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Case-made.

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Plaintiff's second amended petition	59- 68	(The above being plaintiff's original petition and subse- quent pleadings, not necessary to print account of amended pleadings filed.)	
Defendant's demurrer to second amended petition and ruling of the court thereon ..	71- 74		
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Plaintiff's amendment to second amended petition	75- 76		

Part to be printed.	Pages.	Part to be omitted.	Pages.
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Motion of plaintiff to strike answer.....	98- 99		
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Deposition of S. H. Smith	180-185		
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Evidence of Edward A. Mosley, Secretary of Interstate Commerce Commission	342-343	All of the evidence offered in rebuttal	345-346
Objection to evidence	344	(The above evidence being decisions of various State courts.)	
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Journal entry affirming case	518	Application for time to file briefs	514
		Journal entry	515
		Stipulation that cause be submitted on briefs	516
		Journal entry	517
Journal entry denying petition for re-hearing	523	Opinion affirming case, the same heretofore shown in this record at pages 9-10 as Exhibit "B" to the petition for writ of error	519-520
Certificate of Clerk to Transcript	Petition for rebearing the same being heretofore shown in this record as Exhibit "A" to the petition for writ of error	521-522
		J. R. COTTINGHAM, S. T. BLEDSOE, GEO. M. GREEN, <i>Attorneys for Plaintiff in Error.</i>	

Service of the above is acknowledged to have been made on me, attorney of record for the defendant in error, this 3 day of April A. D. 1913.

H. H. SMITH,
Attorney for Defendant in Error.

528 [Endorsed:] No. 965/23540. In the Supreme Court of the United States. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, vs. H. F. Moore, C. E. Robinson, and S. H. Smith, Defendants in Error. State- of Errors, and Part of Record to be Printed.

529 [Endorsed:] File No. 23,540. Supreme Court U. S., October Term, 1912. Term No. 965. The Atchison, Topeka & Santa Fe Ry. Co., Plaintiff in Error, vs. H. F. Moore et al. Designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed April 14, 1913.

Endorsed on cover: File No. 23,540. Oklahoma Supreme Court Term No. 451. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, vs. H. F. Moore, C. E. Robinson, and S. H. Smith. Filed February 6th, 1913. File No. 23,540.

FILED
NOV 27 1913
JAMES D. MAHER
CLERK

13
IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

NUMBER 451.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON AND S. H.
SMITH,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSI-
TION TO MOTION TO DISMISS WRIT OF
ERROR OR AFFIRM.

S. T. BLEDSOE,
J. R. COTTINGHAM,
GEO. M. GREEN,

Attorneys for Plaintiff in Error.

Oklahoma Law Brief Co., 219-20-21 Majestic Bldg. Oklahoma City



IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

NUMBER 451.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON AND S. H.
SMITH,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSI- TION TO MOTION TO DISMISS WRIT OF ERROR OR AFFIRM.

The questions involved in the motion to dismiss or affirm in this case are identical with those in the case of *The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, v. C. E. Robinson, Defendant in Error*, No. 450, October, 1913, term of this court.

In that case the plaintiff in error has filed a full and complete response to the motion to dismiss the writ of error or affirm, calling attention to

each part of the record material to a consideration to the questions involved in said motion, and of the evidence in relation thereto and to the total absence of evidence in the record supporting the contention of the defendant in error.

The animal, for damage to which suit was brought in case No. 450, moved under the same contract, in the same car, between the same stations, and at the same time as the one involved in the case at bar.

It is not deemed necessary to more than call the attention of the court to the history of this case as it appears in the record.

STATEMENT.

The plaintiff in error sued out a writ of error to this court from the Supreme Court of Oklahoma to review the judgment of that court affirming a judgment of the trial court, awarding the plaintiff damages in the sum of \$1400.00 alleged to have been caused to a certain race horse in the transportation of such horse from Kansas City, in the State of Missouri, to Lawrence, in the State of Kansas, on the 16th day of September, 1907. The printed transcript does not include the entire record certified by the Supreme Court of the State, but

includes such parts thereof as are necessary for a consideration of the issues presented to this court for decision. Counsel for plaintiff in error designated, as required by the rules of this court, the parts of the record deemed by them relevant and material to the disposition of the issues involved herein, and served such designation upon counsel for defendants in error, who accepted service of the same (Tr. 183-186). No counter notice to include additional matter was served as permitted by the rules of this court.

On the 25th day of November, 1908, the defendants in error, hereinafter referred to as plaintiffs, filed their second amended petition (Tr. 18-23) against the plaintiff in error, hereinafter referred to as defendant.

In this petition they sought to recover damages in the sum of \$2000.00 for injuries alleged to have been suffered by a certain pacing mare named Sousa Me, while being transported over the line of railroad of the defendant company from Kansas City, in the State of Missouri, to Lawrence, in the State of Kansas, the allegation in the petition being that "the damage resulted from rough handling in transit." (Tr. 18-23).

To this amended petition, after demurrer had been overruled, the defendant filed its answer, setting up among other things, a shipping contract limiting liability of the defendant for damages that might occur during the transportation of said animal (Tr. 26-39). Incidentally it was alleged in this case that this shipping contract was entered into in the State of Missouri, and that the limitation of liability therein contained was valid under the laws of that State, and that the transportation was to be concluded in Kansas, and that the limitation of liability therein contained was valid under the laws of that State. It was specifically alleged that such contract was fairly entered into upon a valid consideration. Subsequently, on the 3rd day of May, 1909, the defendant filed its amended answer to said second amended petition. In view of the statement of the issues as found in the motion to dismiss, said amended answer is here reproduced in full and is as follows:

"Comes now the defendant and by leave of court as had and obtained, files the following amendment to its answer, not waiving any matter pleaded in said answer, and filing the following amendment as supplemental thereto and as an amendment thereto.

"The defendant alleges and avers the fact to be that said shipment was from the State

of Missouri into the State of Kansas, and was, therefore, an interstate shipment, and said shipment was made upon a tariff of rates, which was duly filed and approved by the Interstate Commerce Commission, and which said tariff had been posted in this defendant's depots, both at Kansas City, Missouri, and at Lawrence, Kansas, and which was in full force and effect at the time said shipment moved; that said tariff was promulgated, filed and published in accordance with an Act of Congress, commonly known as the Interstate Commerce Act, which was approved June 29, 1906; that by said tariff which was filed with the Interstate Commerce Commission, and posted as provided by law, as above set out, and which was approved by said Interstate Commerce Commission, and which was the legal tariff governing interstate shipments of freight, and live stock, it was provided as follows:

"(a) Rates named in section two apply on shipments of ordinary live stock, where contracts are executed by shippers on blanks furnished by these companies, and are based on the declared valuation by the shipper at time contract is signed, not to exceed the following:

Each horse or pony (geld- ing, mare, stallion) mule	
or Jack	\$100.00
Each Ox, Bull or Steer...	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat.....	3.00

"(b) Where the declared value exceeds the above an addition of twenty-five per cent

will be added to the rate of each one hundred per cent or fractional part thereof of additional declared valuation per head.

“‘Animals exceeding in value \$800.00 per head will be taken only by special arrangement.

“‘(c) Table of rates will be charged on shipments of live stock made with limitation of company’s liability at common law, and under this status shippers will have the choice of executing or accepting contracts for shipments of live stock with or without limitation of liability and rates accordingly.’

“That said shippers obtained the benefit of such reduced rate applicable to the value fixed in the written contract governing said shipment of horses; that said shipment, set out in the petition, was made in all respects, under the said tariff, so filed with the Interstate Commerce Commission and the same is in all respects, governed by the Act of Congress of the United States, above set out, commonly known as the Interstate Commerce Act, and that the rights and liabilities of the defendant to this action are determined and fixed by said Act of Congress, and in deciding the rights of the parties hereunder a consideration of said Act of Congress is necessary, and that the rights and liabilities of the parties to this action cannot be fixed or determined except by a construction of said Act of Congress.

“That the liability of the defendant under this Bill of Lading, and the construction of the said Act of Congress has never been clearly and unequivocally adjudicated and settled by the Supreme Court of the United States, and

that the construction of said statute in respect to the questions presented herein under said Bill of Lading are still unsettled by said Supreme Court.

"And defendant further alleges that there is a controversy between the plaintiff and the defendant in this action, above set out, and that the decision of this case and of the rights and liabilities of the parties thereto requires an adjudication as to the proper construction of said Act of Congress and a settlement of the controversy between the parties as to the meaning and effect thereof.

"Wherefore, defendant prays judgment as in the answer, to which this is an amendment, prayed."

The filing of this amended answer was a direct assertion that the shipment was controlled by and the validity of the contract was to be determined under the provisions of the Act to Regulate Commerce and the amendments thereto. If anything in conflict with such construction is found in the previous answer it was abandoned by the filing of this amended answer. It is not believed, however, that anything in the original answer is in conflict with the amended answer. The execution of the limited liability contract relied upon by the defendant by plaintiffs, was admitted throughout the record. There is no denial of the fact that the shipment moved under the limited liability contract. There is no denial of the fact that the

freight was paid on the basis of rates prescribed for limiting liability contracts in accordance with the terms of the limited liability contract. The answer pleading the written contract was verified as required by the Oklahoma statute. The reply was not verified, and under the statute a non-verified pleading does not operate to challenge the execution of a written instrument. The interstate tariffs covering the shipment were duly certified and admitted in evidence (Tr. 159).

The contention of the defendant that the shipment was an interstate one, and the validity of the shipping contract to be determined by the Act to Regulate Commerce and not by the laws of the State of Oklahoma or any other State, was covered by exceptions to the instructions given to the jury by the trial court (Tr. 160-165), and by instructions requested by counsel for defendant (Tr. 165-170), by the 15th and 16th paragraphs in the motion for new trial (Tr. 172), by the 16th and 17th assignments of error as found in the petition in error in the Supreme Court of Oklahoma (Tr. 15), by the petition for re-hearing filed in the Supreme Court of Oklahoma (Tr. 4-5), by the petition for writ of error to this court (Tr. 2-4) and by the assignments of error to the action of the Supreme Court

of the State of Oklahoma for review by this court (Tr. 8-10). Notwithstanding the statement contained in the motion to dismiss or affirm filed by the plaintiffs in this court, it appears that the defendant presented its Federal question in its amended answer to the second amended petition, that it urged the same on the trial of the cause on objection to the admission of evidence, by demurrer to the evidence, by motion to direct a verdict, by exceptions to instructions given, and by exceptions to the failure of the court to give requested instructions. Defendant therefore has at all times and at every stage of the cause insisted that the validity of the shipping contract should be determined under the Act to Regulate Commerce, and not otherwise. The allegation that the contract was valid under the laws of the State of Missouri, where the shipment originated, and under the laws of the State of Kansas, is in no wise in conflict with the allegation that the validity of the contract should be determined under the Act to Regulate Commerce.

We will not undertake to set out in detail the evidence relating to the federal question. It is identical in almost every particular with that in the Robinson case above referred to.

ARGUMENT.

It is respectfully submitted that a judicial consideration of the record fails to disclose a scintilla of evidence in support of the findings of the Commission of Appeals for Oklahoma in eliminating the act to regulate commerce, the published tariffs, and the effect of the contract made pursuant to such act and said tariffs. That this case presents to this court for review a well-defined and vital federal question, it seems to us, is conclusively established by the following cases:

Mackey v. Dillan, 4 How. 421-447;
Dower v. Richards, 151 U. S. 658, 667;
Stanley v. Schwalby, 162 U. S. 255, 274, 77-79;
Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S. 1;
Kansas City Southern Ry. Co. v. Albers Com. Co., 223 U. S. 573-591;
Chicago & Alton R. Co. v. Kirby, 225 U. S. 155;
Adams Express Co. v. Croninger, 226 U. S. 491-9;
Chicago, Burlington & Quincy R. Co. v. Miller, 226 U. S. 513;
Chicago, St. Paul, Minnesota & Omaha R. Co. v. Latta, 226 U. S. 519;
Southern Pacific R. Co. v. Schuyler, 227 U. S. 601-611;

Kansas City Southern Ry. Co. v. Carl,
227 U. S. 639;

Missouri, Kansas & Texas Ry Co. v.
Harriman, 227 U. S. 657;

Louisiana R. R. Com. v. Texas &
Pacific R. Co., 229 U. S. 336;

Wells Fargo & Co. v. Neiman-Marcus
Co., 227 U. S. 469-474-475-476;

Can. v. Texas & Pacific R. Co., 194
U. S. 427.

The federal question here involved is much more full and directly presented than in most of the above mentioned cases. It was presented and preserved at every step in the proceedings.

We do not feel it necessary to go into further detail, because of the full presentation in the Robinson case and the fact that both causes were disposed of by the Supreme Court of the State upon the same grounds and in practically the same opinion. There was an opinion in the case at bar, but it referred to the opinion in the Robinson case as controlling.

It is respectfully submitted that there is no merit whatever in the motion to dismiss.

Respectfully submitted,

S. T. BLEDSOE,
J. R. COTTINGHAM,
GEO. M. GREEN,

Attorneys for Plaintiff in Error.

FILED
JAN 27 1914
JAMES D. MAHER
ERK

In the
Supreme Court of the United States

NUMBER 451.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Plaintiff in Error,

vs.

H. F. MOORE, C. E. ROBINSON and S. H.
SMITH,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

S. T. BLEDSOE,
J. R. COTTINGHAM,
GEO. M. GREEN,

Attorneys for Plaintiff in Error.



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In the
Supreme Court of the United States

NUMBER 451.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Plaintiff in Error,
vs.

H. F. MOORE, C. E. ROBINSON and S. H.
SMITH,

Defendants in Error.

STATEMENT OF CASE.

H. F. Moore, C. E. Robinson and S. H. Smith, defendants in error, hereinafter referred to as plaintiffs, instituted suit in the District Court of Lincoln County, Oklahoma, to recover damages alleged to have resulted from the transportation by the Atchison, Topeka & Santa Fe Railway Com-

pany, hereinafter referred to as defendant, to a certain mare, "Sousa Mc.," from Kansas City, Missouri, to Lawrence, Kansas, on the 16th day of September, 1907.

The trial resulted in a verdict and judgment for the plaintiffs in the sum of \$1400.00, which judgment was, on appeal to the Supreme Court of the State, affirmed.

A petition for re-hearing was filed in the Supreme Court of the State, overruled, and a writ of error obtained to this Court to reverse the judgment of the Supreme Court of the State of Oklahoma.

The printed transcript does not include the entire record, certified by the Clerk of the Supreme Court of the State, but only such parts thereof as are necessary for a consideration of the issues presented to this Court for disposition, the record having been prepared and printed pursuant to Paragraph 9, of Rule 10, of this Court.

On the 29th day of June, 1908, plaintiffs filed their amended petition (Tr. 18-23) against the defendant, seeking to recover damages in the sum of \$1,990.00 for injuries alleged to have been suffered by a certain pacing mare, named Sousa

Me., while being transported over the line of railroad of the defendant from Kansas City, in the State of Missouri, to Lawrence, in the State of Kansas. The allegations in the petition being that the damage resulted from "rough handling in transit."

To this amended petition, after demurrer had been overruled, the defendant filed its answer, setting up among other things, a shipping contract limiting the liability of the defendant for damages that might occur during the transportation of said animal (Tr. 26-38). Incidentally it was alleged that this shipping contract was entered into in the State of Missouri, and the limitation of liability therein contained was valid under the laws of that State. It was specifically alleged (Tr. 27) be concluded in Kansas, and the limitation of liability therein contained was valid under the laws of that State. It was specifically alleged (Tr. 31) that such contract was fairly entered into upon a valid consideration (Tr. 27). Subsequently, on the 19th day of April, 1909, the defendant filed its amended answer to said amended petition, (Tr. 41-43). In view of the statement of the issues as found in the motion to dismiss, said amended an-

swer is here reproduced in full and is as follows:

“The defendant alleges and avers the fact to be that said shipment was from the State of Missouri into the State of Kansas, and was, therefore, an interstate shipment, and said shipment was made upon a tariff of rates which was duly filed and approved by the Interstate Commerce Commission, and which said tariff had been posted in this defendant's depots, both at Kansas City, Missouri, and at Lawrence, Kansas, and which was in full force and effect at the time said shipment moved; that said tariff was promulgated, filed and published in accordance with an Act of Congress, commonly known as the Interstate Commerce Act, which was approved June 29th, 1906; that by said tariff which was filed with the Interstate Commerce Commission, and posted as provided by law, as above set out, and which was approved by the said Interstate Commerce Commission, and which was the legal tariff governing interstate shipments of freight and live stock, it was provided as follows:

““(a) Rates named in section two apply on shipments of ordinary live stock, where contracts are executed by shippers on blanks furnished by these companies, and are based on the declared valuation by the shipper at time contract is signed, not to exceed the following:

“Each horse or pony (gelding, mare, stallion), mule or jack, \$100.00. Each ox, bull, or steer, \$50.00. Each cow \$30.00. Each calf, \$10.00. Each hog, \$10.00. Each sheep or goat, \$3.00.

““(b) Where the declared value exceeds the above an addition of twenty-five per cent

will be added to the rate for each one hundred per cent or fractional part thereof of additional declared valuation per head. Animals exceeding in value \$800.00 per head will be taken only by special arrangement.

““(e) Table of rates named will be charged on shipments of live stock made with limitation of company's liability at common law, and under this statute shippers will have the choice of executing or accepting contracts for shipments of live stock with or without limitation of liability and rates accordingly.”

“That said shippers obtained the benefit of such reduced rate applicable to the value fixed in the written contract governing said shipment of horses; that said shipment set out in the petition was made in all respects under the said tariff so filed with the Interstate Commerce Commission, and the same is in all respects governed by the Act of Congress of the United States, above set out, commonly known as the Interstate Commerce Act, and that the rights and liabilities of defendant to this action are determined and fixed by said Act of Congress, and in deciding the rights of the parties herenunder a consideration of the rights and liabilities of the parties to this action cannot be fixed or determined except by a construction of said Act of Congress.

“That the liability of the defendant under this Bill of Lading and the construction of the said Act of Congress has never been clearly and unequivocally adjudicated and settled by the Supreme Court of the United States and that the construction of said statute in respect to the questions presented herein under said

Bill of Lading are still unsettled by said Supreme Court.

“And defendant further alleges that there is a controversy between the plaintiff and the defendant and in this action, above set out, and that the decision of this case and of the rights and liabilities of the parties thereto, requires an adjudication as to the proper construction of said Act of Congress and a settlement of the controversy between the parties as to the meaning and effect thereof.

“Wherefore defendant prays judgment as in the answer, to which this is an amendment, prayed.”

The filing of this amended answer was a direct assertion that the shipment was controlled by and the validity of the contract was to be determined under the provisions of the Act to Regulate Commerce and the amendments thereto. If anything in conflict with such contention is found in the previous answer it was abandoned by the filing of this amended answer. It is not believed, however, that anything in the original answer is in conflict with the amended answer. The execution of the limited liability contract relied upon by defendant, by the plaintiff Robinson, was admitted throughout the record. There is no denial of the fact that the shipment moved under the limited liability contract. There is no denial of the fact

that the freight was paid on the basis of the rates prescribed for limited liability contracts, and in accordance with the terms of the limited liability contract. The answer pleading the written contract was verified as required by the Oklahoma statute. The reply was not verified, and under the statute a non-verified pleading does not operate to challenge the execution of a written instrument. The interstate tariffs covering the shipment were duly certified and admitted in evidence. (Tr. 159.)

The contention of the defendant that the shipment was an interstate one, and the validity of the shipping contract to be determined by the Act to Regulate Commerce and not by the laws of the State of Oklahoma or any other State, was covered by exceptions to the instructions given to the jury by the trial court (Tr. 160-163), by instructions requested by counsel for defendant (Tr. 168-170), by the 15th and 16th paragraphs of the motion for new trial (Tr. 172), by the 16th and 17th assignments of error as found in the petition in error in the Supreme Court of Oklahoma (Tr. 9-10), by the petition for rehearing filed in the Supreme Court of Oklahoma (Tr. 4-6), by the petition for writ of error to this court (Tr. 2-4),

and by the assignments of error to the action of the Supreme Court of the State of Oklahoma for review by this court (Tr. 8-10).

ABSTRACT AND REVIEW OF EVIDENCE.

We will consider first, the facts; second, the law applicable thereto.

The plaintiff Robinson, by signing H. F. Moore's name, executed a limited liability shipping contract, in which it was agreed that the liability of the carrier should be limited to \$100.00 per head in consideration of the application of a special published tariff rate, applicable to livestock moving under limited liability contracts. We quote from the title and caption of that contract as follows:

“Form 67-A. Regular.

Read this Contract carefully as numerous changes have been made.

LIVESTOCK CONTRACT (LIMITED LIABILITY.)

The Atchison, Topeka & Santa Fe Railway Company.

Rules and Regulations for the Transportation of Live Stock.

Notice—This Railway has two rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of Stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuation therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract." (Tr. p. 31.)

Paragraph 3 of this contract, so far as applicable to the issue here involved, is as follows:

"Third. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, it being understood that the rate given is based upon such limit of valuation, which is the highest value accepted for the lower rate (animals of higher value being charged a higher rate); and in case of loss or damage from any cause for which the company may be liable, payment shall be made therefor only on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed the value as held by the shipper, to wit:

"For each horse or pony, gelding, mare or stallion, mule or jack, per head, \$100." (Tr. 33.)

With reference to the execution of this contract Mr. Moore, who was both consignor and consignee therein, testified as follows:

"Q. Can you state whose signature that is?

A. That is my signature made by Mr. Robinson.

Q. That is your signature, and Mr. Robinson was authorized by you to sign it?

A. Yes, sir.

Q. Did you have this contract?

A. I presume Mr. Robinson had it.' (Tr. 65.)

Q. You testified you always took a bill of lading when the horses were loaded?

A. We took a contract.

Q. Did you, or do you know the conditions of the contract?

To which the defendant objects as incompetent, irrelevant and immaterial, I presume he did know.

A. Certainly, I know; I never read the damn thing, but I know what it means." (Tr. 69.)

Also the following from the evidence of one of the plaintiffs, Robinson:

"Q. When did you make your arrangements about shipping—getting your contract?

A. Why, that was after we had loaded the horses; I would judge about 8 o'clock.

Q. Did you have any conversation with the chief clerk at the time you signed the contract?

A. No, sir.

Q. With the party that you signed the contract with, did you have any conversation?

A. The bill clerk?

Q. Yes, sir.

A. Yes, I asked him about when that through

freight was going out and he told me it would be about 9 o'clock.

Q. That was at the time you got the contract—about 8 in the evening?

A. Yes, sir.

Q. As soon as you got the horses loaded, you went right to his office and got the contract?

A. No, sir.

Q. What did you do?

A. I went after the contract—about 8 o'clock. I went up there as soon as I got the horses loaded and he was not ready and told me to come back after while and get the contract.

Q. Now, those horses were shipped in Mr. Moore's name?

A. Yes, sir.

Q. Why were they shipped in his name?

A. Because he was supposed to go with them.

Q. He was in charge of the shipment?

A. I was in charge of it as much as he was.

Q. But they were shipped in his name?

A. I didn't know for sure whether I would be there when the horses got there or not, so he could get them off, was the reason they were shipped in his name.

Q. You usually got a contract of shipment in moving your horses?

A. As a rule, sometimes we did and sometimes we didn't.

Q. Up there in North Dakota you usually had a contract of shipment?

A. Yes, as a rule. (Tr. 116.)

Q. What did you do with your contract of shipment in this case?

A. I don't remember.

Plaintiff objects as incompetent, irrelevant, im-

material, and not proper cross-examination; it has not been shown he had any contract.

Overruled. Exception taken.

Q. You and Mr. Moore both rode in the car together, did you?

A. Yes, sir.

Q. You signed the contract of shipment upon which these horses moved?

A. Yes, sir.

Q. Signed Mr. Moore's name?

A. Yes, sir.

Q. He authorized you to sign it?

A. Yes, sir.

Re-direct Examination by Mr. Smith.

Q. Mr. Robinson, did the billing clerk say anything to you about Mr. Moore signing the contract when he brought it to you?

A. He said the contract is ready and I said Mr. Moore is in the car, and he said I could sign as well as Mr. Moore, and I had this authority to use his signature if I wanted to, and I signed it."

It also appears from the evidence of Moore, who was both consignor and consignee in the bill of lading, that he and Robinson had been together from March, 1907, until September, 1907, traveling over the country attending fairs and participating in the racing with from four to five horses. (Tr. 62-63.) The mare here involved, with certain others, was shipped from Kentucky in March, 1907, to Courtney, North Dakota, Robinson and Moore being together. They then shipped

from Courtney to Carrington, N. Dakota; from there to New Rockford, N. Dakota; from there to Valley City, N. Dakota; from Valley City to Kensal; from Kensal to Fessenden; from Fessenden to Harvey; from Harvey to Armour, apparently all in South Dakota; from Armour to Manhattan, Kansas; from Manhattan to Clay Center; from Clay Center to Topeka; from Topeka to Kansas City, and from Kansas City to Lawrence.

So far as disclosed by the record, Robinson was accompanied at all times by Mr. Moore, a former railroad agent and tariff expert; by Mr. H. H. Smith, learned counsel for defendants in error in this case, and also witness for plaintiff on the trial of the cause. (Tr. 120-135.)

Mr. Robinson, at the time he signed Mr. Moore's name to the limited liability contract here involved, had had at least six months' experience in the shipping of race horses; had the advice and assistance of an ex-railroad agent, undoubtedly familiar with tariffs and limited liability contracts. He had the assistance of counsel, learned in the law, familiar with race horses, with the Act to Regulate Commerce and the forms of limited liability contracts, and the custom of railways in reference to their manner of execution.

Mr. Robinson testified (Tr. 113) that he signed a shipping contract covering almost every movement of the race horses detailed in the evidence.

The entire conversation between Robinson and some one he supposes to be the agent of the railway company at Kansas City, Missouri, which is relied upon to constitute an oral contract, and which the trial court and the Supreme Court of the State, in effect, held could not be superseded by any written agreement, is as summarized in plaintiff Robinson's evidence as follows:

“Q. Just state what the conversation was?
(Tr. 100.)

Defendant objects as repetition. Overruled.
Exception taken.

A. I told him we had race horses and wanted to go to Lawrence in good shape and wanted to go on a through freight, and he told us about the Red Ball freight and said he would put us on that freight; never said anything about any other kind of a freight.

Q. Did you tell him what you wanted to go to Lawrence for?

Objected to by defendant.

Sustained.

Exception.

Q. What did you say about going to Lawrence?

A. I told him we had a race there and wanted to go on a good freight so they would be

in good shape and didn't want them knocked around.

Q. Mr. Robinson, when you say that you talked with the agent at Kansas City, wish you would state just what you said to him? (Tr. 117.)

A. What I said to the gentleman?

Q. Yes, sir?

A. Why, I just spoke to him about getting out on this fast freight, you know, so the horses would not be bumped around in the yard by switching and on the way over there by local freight, and I told him I wouldn't ship them under any consideration on any other kind of a freight, because I wouldn't get there in any shape.

Q. Just use the language that was said between you.

A. Well, I don't remember what he said, only he said we could go on this through freight, and they plastered the Red Ball tag on us, on our car, about eight o'clock.

Q. Well, what did you say to the agent?

A. I told him just what I said; I wanted to go on a through freight and wouldn't go on any other kind of a freight.

Q. That is all that you said to him is it?

A. That is the main thing I talked about—getting out on this through freight.

Q. Have you given us all the conversation and just what he said to you?

A. Well, I have given you the most of it; I said whole lots more to him of course, but that's the main point."

The same transaction is described by Mr. H. H. Smith, counsel for defendants in error, in his

evidence in the following language (Tr. 125):

“Q. Who made the arrangements with the Company for that shipment?

A. Well, I called the office up, the freight office, from the Baltimore Hotel in the morning and then went out to the track, and then Mr. Robinson and I went to the telephone and called up the freight office and he talked to them; my recollection is he talked to them from the track, but I talked to them from the Baltimore Hotel in the morning.

Q. State what that conversation was?

A. Well, I told them—

Defendant objects as incompetent, irrelevant and immaterial, tending to vary terms of written contract.

Overruled. Exception taken.

A. I called, I think, for the agent, and they gave me the chief clerk's is my recollection, and somebody answered and said the chief clerk was not there but he answered in his place and my conversation was with him, and I think he said he was the next man to the Chief Clerk or something. I told him I had two horses myself out at the track and there were two other horses we wanted to ship to Lawrence to the races and we would like to know if we could get on a fast freight so as not to be delayed around the yards and get to Lawrence quickly, that is in two or three hours. He told me we would get out of there at ten o'clock on a freight called the Red Ball, and probably be on the road two hours, not exceeding three hours anyway. I told him we wanted to ship those horses there to the races. I

don't recollect what he said. I think he said he didn't know what time we would have to load and to call them up later—I am pretty sure that's why we called them up again.

Q. That is the conversation Robinson had from the track?

A. Yes."

The agent Dubois said that it was after the horses were loaded that the contract was signed, but this was clearly an assumption on his part because he further stated he did not know when they were loaded. However, we regard this as immaterial.

The witness Dubois testified for the defendant (Tr. 135), and fully explained the application of the classification and rate, and the provisions of the tariff applicable to the shipment were read into the record, as follows: "One hundred and fifty per cent. (150 per cent) of the rates named herein will be charged on shipments of live stock made without limitation of the company's liability at common law, and under this status shippers will have the choice of exercising and accepting contracts for shipments of live stock with or without limitation of liability, and rates accordingly" (Tr. 140).

This provision is found on page 34 of the tariff, the printed record refers to page 84. This is a typographical error and should be page 34.

We doubt if the history of litigation will disclose parties better equipped by experience and expert assistants to fully protect their interests than the plaintiffs as to the transaction herein involved.

To summarize:

First.

We have the admitted execution of a contract by the plaintiffs limiting the liability of the defendant to \$100, fairly and freely executed.

Second.

We have a printed and published tariff prescribing a special rate where a limited liability contract is executed.

Third.

We have the plaintiffs executing a contract who were thoroughly conversant with such contracts and who had had a large experience making live stock shipments under limited liability contracts.

Fourth.

The plaintiffs received, at the time they executed said contract, a duplicate thereof in writing,

and there is no evidence that there was any stress, or rush, or any reason why they did not read the same, if in any event they did not; nor is there a scintilla of evidence that they did not understand the contract he executed.

Fifth.

Robinson testified that he executed the limited liability contract by signing Mr. Moore's name thereto, and that he was authorized to sign the same. He did not testify or even suggest that he was not aware, to the fullest extent, of the terms of the contract he signed.

Sixth.

We have the admission of the execution of the written contract pursuant to the printed and published tariffs, and there is not a scintilla of evidence that the plaintiffs were misled, or misunderstood, or misapprehended the language or meaning of the contract, or that there was any fraud perpetrated upon them or any wrong done them in any particular in the execution of the contract.

Extracts from the act to regulate commerce, approved February 4th, 1887, as amended by the act of June 29th, 1906. (Chap. 3591, 34 Stat. 584) pertinent to issues involved:

Section 2 reads:

“That if any common carrier subject to the provisions of this Act, shall, directly or indirectly, by any special rate, rebate, draw-back, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”

Section 3 in part provides:

“That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

Section 6 in part provides:

“That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and

can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

“No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers, or property, except such as are specified in such tariff.”

Section 10 in part provides:

“Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then es-

tablished and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.” Section 20 in part provides:

“That any common carrier, railroad, or

transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

“That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof.”

Extracts from the Elkins Act.

Section one of the Act of February 19, 1903, c. 708, 32 Stat. 847, entitled, “An Act to further regulate commerce with foreign nations and among the States,” commonly known as the Elkins Act,

as amended by section two of the Act of June 29, 1906, c. 3591, 34 Stat. 587, provides that:

“The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction, etc., * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce, and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction, etc. * * *”

“* * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any de-

parture from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

ASSIGNMENT OF ERRORS.

(Tr. 13, 14, 15.)

First.

That the Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Lincoln County, State of Oklahoma.

Second.

That the Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Lincoln County, State of Oklahoma.

Third.

The Supreme Court of Oklahoma erred in holding that the contract set forth in the petition and amendment thereto of the defendant in error, plaintiff below, was a valid contract.

Fourth.

The Supreme Court of Oklahoma erred in refusing to hold said contract void as being a contract in violation of the Act of Congress of February 4th, 1887, and the amendments thereto, commonly called the Interstate Commerce Act or the Act to Regulate Commerce.

Fifth.

The Supreme Court of Oklahoma erred in affirming said judgment enforcing a contract which was void as being in contravention of and a violation of the Act of Congress of February 4th, 1887, and the amendments thereto, entitled an Act of Congress of February 4th, 1887, approved February 4th, 1887, and in effect April 5th, 1887 (24 Stat. at Large 379), as amended by an Act approved March 2nd, 1889 (25 Stat. at Large 885), and by an Act approved February 10th, 1891 (26 Stat. at Large 743), and by an Act approved February 8th, 1895 (28 Stat. at Large 643), and by an Act approved June 29th, 1906 (34 Stat. at Large 584), known as the Interstate Commerce Act or an Act to Regulate Commerce.

Sixth.

The Supreme Court of Oklahoma erred in its failure to consider the federal question presented in said cause and in concluding that said Supreme Court of the State of Oklahoma could legally dispose of the issue in said cause without passing upon and deciding as to whether or not said alleged contract of shipment was in violation of the Act to Regulate Commerce, and such action was a denial to the plaintiff in error of a right, title, privilege and immunity specially set up and claimed under such clause and section of the said Interstate Commerce Act to the great damage of the plaintiff in error.

Seventh.

The Supreme Court of Oklahoma erred in holding that the alleged contract was not in-

valid and that it was, if made, in violation of the Act of Congress and amendments and particularly in violation of Sections 2, 3, 6, and 10 of said Act of Congress as amended June 29th, 1906.

Eighth.

The Supreme Court of Oklahoma erred in refusing to hold that said contract was invalid as being in violation of said Act and sections thereof.

Ninth.

The Supreme Court of Oklahoma erred in refusing to hold that said contract was discriminatory and unlawful under said Act and sections thereof.

Tenth.

The Supreme Court of Oklahoma erred in holding that the defendant in error was not bound by the terms and provisions of the tariffs and classifications on file with the Interstate Commerce Commission and with its agent at Kansas City, Missouri, the point of origin of said shipment.

Eleventh.

The Supreme Court of Oklahoma erred in holding that the plaintiff in error had a right under the evidence in the case to agree to carry the horses in said shipment upon its Red Ball freight train.

Twelfth.

The Supreme Court of Oklahoma erred in holding that the alleged agreement to carry

the horses upon the Red Ball freight train, a particular train, was not an agreement to perform a special service not provided for by the published tariff and classification.

Thirteenth.

The Supreme Court of Oklahoma erred in holding that the contract of shipment was the oral negotiations had over the telephone with the shipper and some one representing himself to be the agent of the railway company, which said contract was in direct violation of and not one provided for by the tariffs and classifications which were on file with the Interstate Commerce Commission and with petitioner's agent at point of origin, and in holding that said verbal negotiations were the contract of shipment, and were not superseded by the written contract of shipment entered into by the parties subsequent to said alleged oral contract.

Fourteenth.

The Supreme Court of Oklahoma erred in holding that the defendant in error was not presumed to have knowledge of the provisions of said Act and sections thereof, and the provisions of the tariffs and classifications on file with the Interstate Commerce Commission and with the agent at Kansas City, Missouri, the point of origin of said shipment.

Fifteenth.

The Supreme Court of Oklahoma erred in holding that the defendant in error was not presumed to know that he contracted for a lower rate than that to which he was lawfully entitled and that he contracted for special privilege in shipment by designated train to

which he was not lawfully entitled, and for which the plaintiff in error and defendant in error could not contract without violating said Acts of Congress and sections thereof.

Sixteenth.

The Supreme Court of Oklahoma erred in its construction and application of the law with reference to said Act and sections thereof as hitherto declared and announced by the Supreme Court of the United States.

Seventeenth.

The Supreme Court of Oklahoma erred in that the judgment aforesaid given was given for said defendant in error and against the Atchison, Topeka & Santa Fe Railway Company, whereas, by the law of the land, the said judgment ought to have been given for the said The Atchison, Topeka & Santa Fe Railway Company.

ARGUMENT.

It is unnecessary to consider the assignments of error in detail. They challenge the correctness of the conclusions of the Supreme Court of the State of Oklahoma in denying to the defendant the benefit of a limited liability contract, the execution of which is admitted by the plaintiffs. They also challenge the correctness of the opinion of the Supreme Court of the State of Oklahoma in holding that an interpretation of the Act to Regulate Commerce is not necessarily involved in determining the validity of the limited liability shipping contract involved in this proceeding. The last mentioned conclusion of the Supreme Court of Oklahoma is based upon an assumption that has no foundation in fact and has not a scintilla of evidence in the record for its support.

On the afternoon of the 16th day of September, 1907, Robinson inquired by telephone of the agent of the defendant, at Kansas City, Missouri, as to when and by what character of train he could have certain race horses transported from Kansas City, Missouri, to Lawrence, Kansas. He was advised if his horses were ready for loading by six o'clock p. m. they could be transported on what was known as the "Red Ball" freight, leav-

ing Kansas City about nine o'clock p. m. Subsequently the horses were loaded and Robinson appeared at the office of the defendant and executed a limited liability contract, by signing the name of a Mr. Moore thereto.

The railroad company had two rates on live-stock in force, one carrier's risk, and the other limited liability. Under the printed and published tariff, by the execution of a limited liability contract a reduction of substantially 33 1/3% was obtained in the transportation rate. The limited liability contract executed by the plaintiffs and the rate paid were both pursuant to and in accordance with the published tariff of the defendant, of the terms of which the plaintiffs were and are charged with knowledge.

Texas & Pac. R. Co. v. Mugg, 202 U. S. 242.

Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, 160.

Kansas City So. R. Co. v. Carl, 227 U. S. 639, 652.

C. B. & Q. R. Co. v. Miller, 226 U. S. 513.

C. St. P. Minn. & Omaha R. Co. v. Latta, 226 U. S. 519.

Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469.

M., K. & T. R. Co. v. Harriman, 227 U. S. 657.

The contract was executed by Robinson deliberately and without anything to prevent his giving the same the fullest consideration. He received and kept a duplicate and at no time denied that he was familiar with the provisions of such contract. The animals moved under this limited liability contract and the freight was paid thereunder. Notwithstanding this fact the Commission of Appeals for Oklahoma held, and this holding was adopted by the Supreme Court of Oklahoma, when it adopted the opinion as a whole, that the inquiry over the telephone as to when the animals could be moved, and the character of train they could be moved in, constituted a completed contract which was not superseded by the deliberate execution by Robinson of the limited liability contract, under which the animals moved, and of the payment of the freight on the basis of such limited liability contract.

The Supreme Court proper of the State of Oklahoma has uniformly held the execution of a limited liability contract under circumstances similar to those here involved, to be valid and binding upon the party, whether he inquired about, read or understood the contract or not, saying that "a shipper of live stock can not, in the absence of

fraud by the carrier, avoid limitations of the carrier's liability contained in the bill of lading or the shipping contract by showing that he executed the contract hurriedly or without due care or that he was ignorant of its contents or failed to read the same." *St. L. & S. F. Ry. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461. The decision in the case at bar, therefore, is not only a departure from all recognized principles, but is an absolute departure from the well established and uniform rule heretofore applied in every instance by the Supreme Court of the State of Oklahoma. No case could probably be found where the shipper of livestock prior to the execution of a limited liability contract did not inquire what time and on what train his shipment would move. No sane man would insist that the railroad company, by reason of the conversation had over the telephone or at the station, for that matter, could have established a liability against the plaintiffs upon a contract of shipment if the plaintiffs had declined to ship or had shipped via some other line.

If it should be held that the evidence of the conversations had between Robinson and the agent above referred to were admissible for any purpose, to give to such evidence the effect given by the Supreme Court of the State of Oklahoma

was to so misapply the same in its effect upon the rights of the defendant under the Act to Regulate Commerce as to constitute a Federal question reviewable by this court.

Mackey v. Dillon, 4 How. 421, 447.

Dower v. Richards, 151 U. S. 658, 667.

K. C. So. R. Co. v. Allen Comm. Co., 223 U. S. 573, 591.

Stanley v. Schwalby, 162 U. S. 255, 274, 77-79.

Nothing short of an absolute misconception of the legal rights of the parties under the Act to Regulate Commerce and of the effect of the printed tariffs and a limited liability contract executed pursuant thereto, could have led the court to the conclusion that this contract based upon and made in accordance with such tariff, and fairly and freely executed, was not binding upon the parties thereto.

This court very appropriately said in the case of *M. K. & T. R. Co. v. Harriman*, 227 U. S. 657, 672:

“The liability sought to be enforced is the ‘liability’ of an interstate carrier for loss or damage under an interstate contract or shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be de-

termined under the general common law, and, as such, is withdrawn from the field of state law or legislation."

This declaration by this court undoubtedly would have the same force in its application to judicial legislation that it would have to that of the ordinary kind.

Review of opinions of this court involving validity
of limitation of liability provisions in inter-
state shipping contracts.

This court has recently, in a series of cases discussed, adjudged, and it seems to us finally determined, the questions involved in the case at bar.

We desire to refer briefly to the facts involved and the opinion of the court in each of these cases.

The case of *Adams Express Co. v. Croninger*, 226 U. S. 491, was a suit to recover the value of a diamond ring delivered to the express company for transportation from Cincinnati, Ohio, to Augusta, Georgia. The case was disposed of on the pleadings. The ring was alleged to be worth \$137.52, and the defendant pleaded that its charges were graduated according to value and that the

lawful rate upon the package from Cincinnati, Ohio, to Augusta, Georgia, was 25c if the value was \$50.00 or less, and was 55c if the value was \$125.00. Suit was brought for the full value. The receipt or bill of lading contained no statement of value, but a stipulation in the following words:

“In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein.”

The express company in its answer pleaded the shipping receipt containing the above recital, and further pleaded that the plaintiff knew the facts recited in said receipt and that if he did not declare the value he could recover only on the basis of the \$50.00 valuation. A demurrer was sustained to the answer, judgment rendered for the plaintiff, which judgment was affirmed by the Supreme Court of the State. This Court reversed that judgment, holding the recital contained in the receipt a binding contract under the Act to Regu-

late Commerce. This court, speaking through Mr. Justice Lurton, said:

“The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction. * * *

“That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type, ‘This Company’s charge is based upon the value of the property, which must be declared by the shipper.’

“That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co. v. Illinois Central Railroad*, 3 Wall. 107; *Railroad Company v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Company*, 93 U. S. 174; *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of

his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

“It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. *York Mfg. Co. v. Railroad*, 3 Wall. 107; *Railroad v. Lockwood*, 17 Wall. 357; *Hart v. Pennsylvania Railroad*, cited above; *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 312, 322; *Steam. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 442; *New York L. E. & W. Ry. Co. v. Estill*, 147 U. S. 591, 619; *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 15; *Chicago, etc., Ry. v. Solan*, 169 U. S. 133, 135; *Calderon v. Atlas Steamship Company*, 170 U. S. 272, 278; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 485.

“That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a

rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

“Neither is it conformable to plain principles of justice that a shipper may underrate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy.” (p. 508, 509, 510.)

What is above said is applicable to every phase of the controversy here.

The case of *Chicago, Burlington & Quincy Railroad Company v. Miller*, 226 U. S. 513, was an action to recover the full value of a stallion shipped from a station in Iowa to a station in Nebraska under a limited liability livestock contract. The loss occurred in the State of Nebraska through the negligence of the carrier, and the suit was in a court of that state. The plaintiff claimed that the stallion was in fact of the value of \$2,000 and that the limitation in the contract was void under the laws of both the State of Iowa and the State of Nebraska. This court, describing the contract in-

volved in the Miller case, uses the following language (p. 517) :

“The receipt or bill of lading placed a value upon the animal of two hundred dollars, and was signed by the shipper's agent. It recited that the schedules of rates and regulations filed with the Interstate Commerce Commission provide alternative rates of charges proportioned to the value of the stock delivered for transportation, as declared by the shipper, and that the recovery of the shipper in case of loss or injury should not be in excess of the value thus agreed upon for the purpose of determining the rate.”

From this description the contract must have been a duplicate of the one involved in the case at bar. The concluding paragraph of the opinion is as follows:

“It follows that the Supreme Court of Nebraska erred in applying to the contract here involved the provisions of the Iowa statute, and of the constitution of the State of Nebraska, and in refusing to apply the exclusive regulation prescribed by Sec. 20 of the act of 1906, as that provision has been construed by this court in the Croninger case above referred to.”

This court thereupon reversed the judgment of the Supreme Court of Nebraska, and remanded the cause to be proceeded with in accordance with its opinion.

The case of *Chicago, St. Paul, Minnesota & Omaha R. Co. v. Latta*, 226 U. S. 519, was an action

to recover the value of two horses lost in the course of interstate transportation. The plaintiff had executed a limited liability contract similar to the one here involved. The judgment of the Circuit Court and of the Circuit Court of Appeals of the Eighth Circuit was for the plaintiff, but reversed by this court.

The case of *Wells Fargo & Co. v. Neiman Marcus Co.*, 227 U. S. 469, was an action by a shipper against an express company to recover for the loss of a package of furs of the alleged value of \$400, shipped from New York to Dallas, Texas, and never delivered. The facts touching the delivery of this shipment to the express company and the circumstances surrounding the same as stated by this court are as follows:

“The defendants in error were permitted to prove that the actual value of the furs was Four Hundred Dollars. That the consignors kept in their shipping office an express book containing blank express receipts. One of these was filled out in their office by their shipping clerk. When the wagon of the express company called at the office the agent signed the receipt, and the package was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value and no value declared other than as shown in the receipt. It was also shown that the clerk, who wrapped and marked the package did not know the value and had no actual

knowledge of the graduated rates of the express company, and that he had had nothing to do with the selling or buying of the furs. One of the consignors, Abraham Jacobson, sold the furs personally and testified as to their value. He testified that he knew if the value had been declared to be four hundred dollars, the express rate would have been higher, and that if no value was especially declared, they would be carried under the express rate applying to a package valued at not in excess of fifty dollars."

The Court of Civil Appeals of Texas found it convenient to dispose of the issues upon a supposed question of fact in the following language (125 S. W. 615):

"The testimony raised the issue of fraud on the shipper's part, but the law never presumes fraud, and under the evidence it is just as fair to presume that value was never thought of at the time, and that the shipper never intended to conceal value from the express company. The express company's agent failed to perform a plain duty—that is, he failed to have the shipper declare the value—and failing in this duty we are of the opinion that the company is in no attitude to complain that the shipper did not state the value. In any event, it was a question for determination, and the trial court was justified under the evidence in finding against the express company. It can not require of a shipper the performance of a duty which was, at least, its plain duty to perform and which it failed to perform. In failing to deliver the package which it agreed to transport and deliver, it breached its contract, and

thereby became liable for the full value of the articles it failed to deliver."

Answering this contention this court said:

"But the shipper in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made, the rate basis."

Beyond question the decision of the Commission of Appeals of the State of Oklahoma is in direct conflict with the law as stated in the above quotation.

The case of *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, was a suit to recover the value of a shipment of household goods from Lawton, Oklahoma, to Gentry, Arkansas. The consignor signed a release valuation of \$5.00 per hundred pounds. The evidence in the record by which the plaintiff, Carl, sought to avoid the effect of this

contract is summarized by this court as follows
(227 U. S. 643):

“The defendant in error testified, over objection, that though he could read and write and had signed the release set out above, and had received the bill of lading, he had neither read them nor asked any questions about them, and had not been given any information as to the contents of either document and had no knowledge of the existence of the two rates. He was also allowed to testify that if he had known of the difference between the two rates, and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation made by the company, or any deceit, or fraud, or concealment, unless it be inferred from the fact that the company made no explanation of the rates or the contents of either the bill of lading or the release. The shipper merely said that the bill of lading was handed to him with the release, which he was asked to sign. Exceptions were taken to the rulings upon evidence and to certain parts of the charge and for the refusal of the court to grant certain requests.”

In disposing of the contention that under these circumstances the plaintiffs were not bound by the valuation fixed in the shipping receipt, this court uses the following language (p. 652, 653):

“The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. In saying

this, we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation, the shipper declares, determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. *Texas & Pacific Railway v. Mugg*, 202 U. S. 242; *Chicago & A. Railway v. Kirby*, 225 U. S. 155.

“It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact; and that which the shipper must pay. The shipper’s knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods car-

ried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. *Texas & Pacific Railway v. Mugg, supra*. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois Central Railroad v. Henderson Elevator Company*, 226 U. S. 441. Nor can a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. *Chicago & Alton Railway Co. v. Kirby, supra*.

“That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. *Southern Oil Company v. Southern Railway Co.*, 19 I. C. C. Rep. 79; *Miller & Lux v. Southern Pacific Company*, 20 I. C. C. Rep. 129.”

As a result of the above conclusion this court reversed the judgment of the Supreme Court of Arkansas, which had affirmed a judgment of the trial court in favor of the plaintiff.

The case of *Missouri, Kansas & Texas Railway Company v. Harriman*, 227 U. S. 657, was an action in a Texas Court by a shipper of cattle under a limited liability livestock transportation contract, similar to the one here involved, from a station in Missouri to a station in Oklahoma, to recover the value of cattle killed by negligent derailment, occurring in Missouri. The shipment

consisted of a number of show cattle, and the plaintiff recovered as their full value in the trial court \$10,640.00. The judgment was affirmed by the court of last resort of the State of Texas. The contract limited the liability of the railway company to \$30.00 for each horse, stallion or bull, and \$20.00 for each cow. This court held that under the contract, the shipper had the choice of two rates, and that (p. 670, 671):

“It is not unreasonable for the purpose of graduating freight according to value to divide the particular subject of transportation into two classes, those above and those below a fixed maximum amount. No other method is practicable, and this is a method administratively approved by the Commerce Commission.

“That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented, may be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value he is concluded, and there is no room for parol evidence to show otherwise.”

The last paragraph has special application to the facts disclosed in the case at bar.

The limitation of valuation expressed in the classification is not a mere incident to the matter

of rate; it is, as is apparent from the above cases, an essential element in the determination of the rate, and the classification in the case at bar so states. The question of a maximum valuation in case of loss is essential to the advising of an alternative rate, because both the element of value and the element of damage in case of loss are properly used as determinative of the rate to be charged. The rate for the movement of the horses, in the size car used, was fixed by the classification and tariff at \$17.60, based upon a released valuation of liability, limited to \$100 for each horse. The classification and tariff were required to be prepared and published by the Federal law. The elements going into the rate, and which may be logically annexed thereto, are, therefore, for determination by the Interstate Commerce Commission.

It is wholly immaterial whether the plaintiff herein actually knew the value, or whether he specifically agreed to it, but the Supreme Court of Oklahoma held to the contrary. The two rates and the release valuation under the lower rate is as much a part of the published tariff as the minimum earload or as the measure of so many cents per one hundred pounds. As the court said in the Harriman case, 227 U. S. 671:

“When the carrier graduates its rates by

value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate."

The opinion of the Commission of Appeals of the State of Oklahoma is based on the erroneous assumption that after the delivery to the carrier it is not competent for the carrier and consignor to agree upon a different rate than that of the unlimited common law liability for the shipment. That to permit the railway company to take the benefit of the limited liability contract after that time, would operate to deprive the shipper of some right he had acquired by delivery of the shipment to the carrier. This is a manifestly erroneous view of the law. Any time prior to the performance of the service by the carrier, the parties are at liberty to enter into a shipping contract in accordance with any one of the options contained in the printed tariff. This option was exercised when the railway company made out and presented to the plaintiff a limited liability contract, and when the plaintiff executed and accepted the same the defendant must be taken to have contracted for an advantage not open to the courts to destroy.

This court has held in a number of cases that a shipper is charged with notice of the rate ap-

plicable, and that an actual want of knowledge is no excuse, and that the effect of such rate is not lost although not actually published in the station.

Texas & Pacific Railway Company v. Mugg, 202 U. S. 242.

Chicago & Alton v. Kirby, 225 U. S. 155, 160.

Kansas City Southern Railway Co. v. Carl, 227 U. S. 639, 652.

Not only is this true, but it is clear from the facts, that the plaintiff was actually familiar with the different classes of livestock contracts and of the existence of different rates under the different contracts. Whether he knew of the actual particular rate under the limited liability contract in the case at bar is immaterial. The result of the opinion of the Commission of Appeals of the State of Oklahoma is a clear evasion of the requirements of the Act to Regulate Commerce. Under its decision no contract limiting liability would be valid under said act unless the valuation was actually agreed upon before loading for shipment.

The result of the action of the Commission of Appeals of Oklahoma is well described by this court (*Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 652), as follows:

“It would open a wide door to fraud and destroy the uniform operation of the published

tariff rate sheets. When there are two published rates based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value.”

ERROR IN INSTRUCTIONS GIVEN BY COURT.

The fourth instruction given by the trial court (Tr. 166), was in effect a direction to the jury to find for the plaintiff and to find against the defendant upon its contention as to limitation of liability under the shipping contract. The court told the jury that if they found that the representation of value was not made by the plaintiff or his agents, but was arbitrarily inserted by the defendant or its agent “or printed in the said contract when the plaintiff Moore’s name was signed to it, you are instructed that plaintiff is not bound by the limitation of \$100.00, and you will find the actual damage which plaintiff has incurred by reason of the injuries to said mare, if any, not exceeding the sum of \$1,890.00.”

In as much as it is admitted that the contract was a printed one and that the values appeared therein, in print, the legal effect of this instruction was to find against the defendant upon its contention as to limitation of liability. In other words the court did not submit the question to the jury,

but instructed the jury to find against the defendant. The statement of law found in the seventh instruction given by the court is as a whole a gross misstatement of the rule applicable. There is not a single paragraph of this statement that correctly applies the rule for determining the validity of limitation of liability in the shipping contract. The instruction evidences a gross want of appreciation of the fundamental principles controlling such liability. Notwithstanding a serious challenge of the correctness of the action of the trial court in giving this instruction the Supreme Court of the state affirmed the judgment. The opinion of the Supreme Court of the State upon this question is found in the third paragraph of the opinion in the companion case, and which was adopted as the law in this case which was omitted from the transcript in the Robinson case, No. 450, in this court, and is as follows:

“(3) The record in this case clearly shows negligence on the part of the railway company. Hence the remaining question is: Was the liability of the company limited to the value fixed in the written contract? A determination of this question depends upon whether the value was fixed by the shipper and whether such value was fairly agreed upon between the shipper and the agent of the carrier. The question may properly be determined without the necessity of construing the federal statute,

known as the 'Hepburn Act.' " (129 Pae. 23.)

It is therefore manifest that the Supreme Court of the State adopted an interpretation of the Act to Regulate Commerce in its application to interstate shipping contracts wholly at variance with the interpretation given by this court in the cases above reviewed.

In conclusion we submit that there is not in the record a scintilla of evidence to impeach, suspend or avoid the written shipping contract or bill of lading under which the livestock involved in this proceeding moved. Such written contract was freely and fairly executed, and under the decisions of this court is conclusive upon the parties. It is therefore respectfully submitted that the judgment of the Supreme Court of the State of Oklahoma, and of the trial court be each reversed, and that the cause be remanded to be disposed of in accordance with the law as heretofore declared by this court.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 450.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, PLAINTIFF IN ERROR,

vs.

C. E. ROBINSON.

No. 451.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, PLAINTIFF IN ERROR,

vs.

H. F. MOORE ET AL.

**NOTES OF ORAL ARGUMENT FOR PLAINTIFF IN
ERROR.**

The Railway Company, plaintiff in error here and defendant in the trial court, will be referred to as defendant, and the defendants in error here, plaintiffs in the trial court

in the two causes, will be referred to as plaintiffs. All references to the record are to the record in cause No. 450.

The causes are in every essential particular identical. The animals involved in the two suits were shipped under one contract, in one car, and from the same place of origin and to the same place of destination.

Briefs of counsel for the plaintiff fail to make reference to the pages of the printed transcripts in this court, as required by the rules of the court, and it is difficult, if not impossible, for this reason, to follow their contentions.

History of the Transaction.

On November 16, 1907, in the afternoon, plaintiff Robinson called up the office of the freight agent of the Atchison, Topeka & Santa Fe Railway Company in Kansas City, Missouri, and inquired at what time and by what train he could ship some horses from Kansas City, Missouri, to Lawrence, Kansas. He was advised that if the horses were ready for loading at six o'clock they could be transported by what is known as the "Red Ball Freight," leaving Kansas City at about nine o'clock p. m.

The plaintiff Moore testified that the horses were loaded "about six o'clock or half past, on September 16th, 1907" (Tr., 70, 96). After the horses were loaded, and about eight o'clock in the evening, Robinson came up and signed Moore's name to the contract of shipment (Tr., 139). Robinson then returned to the car where the horses were, and went with the horses to Lawrence, Kansas. In reference to the time the horses were moved, Robinson testified as follows (Tr., 97):

"Q. What time were you moved from where you were loaded?

"A. We were pulled out of there about nine o'clock—somewhere between nine and ten o'clock.

"Q. Do you know how long you were in the freight yards on the Missouri side?

"A. No, sir; I could not say exactly; but over half the night—to say, midnight."

It will be observed, therefore, that the contract was executed by the signature of Moore's name by Robinson at least an hour and perhaps two hours before the car was moved from where the animals were loaded. The statement in the brief for plaintiff, that the animals were en route to Lawrence before the shipping contract was signed, is clearly in error. This is further manifested by the fact that Robinson, after signing the contract, by attaching Moore's name thereto, returned, and went with the car, or at least with the train in which the car was, from Kansas City to Lawrence (Tr. 112-114).

The contract under which the shipment moved limited the liability of the carrier to one hundred dollars for each of the animals transported (Tr., 33-41). The rate charged was the published tariff rate, where the liability was limited to the amount specified in the contract (Tr., 44, 135-6-7). This is also shown by the way-bill (Tr., 154-5) and by the expense account, marked Exhibit "B" to the deposition of the plaintiff Moore (Tr., 77). Some little controversy arose over the amount of the freight, because of the loading in the car without billing or notice to the Railway Company of the bikes, carts, and racing paraphernalia of the plaintiffs (Tr., 124). It was suggested by plaintiff-witness-attorney Smith that he might have deposited \$20 on account of freight and then afterwards paid \$2.60 more (Tr., 127), but he was not sure whether it was \$20 or \$15, or whether he or Mr. Moore paid it. The undisputed evidence of Hult is that a \$15 deposit was left with him, and that Mr. Bailey, the then agent, collected the \$2.60 additional, and turned it in to him, making a total of \$17.60, the amount shown in the expense bill and the way-bill (Tr., 147). The way-bill was in accordance with the rate for limited liability shipments, and the amount collected was under that rate. Whatever controversy may have arisen in reference to the freight was, as stated by the witness Smith, the result of loading in the car without including in the bill of lading the way-bill or expense account of bikes, carts, and racing paraphernalia.

History of the Litigation.

The plaintiff sued upon an oral agreement, and the defendants pleaded a written contract, limiting liability to one hundred dollars for each of the animals. The defendant filed an amended answer (Tr., 44), setting up specifically the tariff provisions and the binding effect of the contract limiting liability (Tr., 45). There was a jury trial and judgment for the plaintiff, the court instructing the jury that if the amount to which the liability was limited was printed in the contract, their verdict should be for the plaintiff for actual damages, disregarding the contract (Tr., 166). The judgment of the trial court was affirmed by the Supreme Court of the State.

ARGUMENT.

I.

No question of fact adverse to the defendant was found by either court. The case was disposed of upon a law question by the court in each instance. The trial court told the jury that if the value to which the right of recovery was limited by the shipping contract was printed in the contract and there when it was executed, they should disregard the contract and find for the plaintiff for the actual damages. In other words, the jury was told in effect that if the Railway Company had no right to publish an interstate tariff grading freight charges in accordance with value or liability, and that the transportation of the animals under such a contract and in accordance with its published tariffs was no defense to a suit for damages actually suffered by the plaintiff. This was apparently upon the theory that there must be such a coming together of the minds of the parties as is necessary to constitute a contract of sale before a limitation

of liability in a shipping contract can be made available as a defense.

This was clearly the application of an erroneous proposition of law to an undisputed state of facts. The court's instruction was manifestly wrong under the decisions of this court, and there was no disputed fact involved.

The Supreme Court of the State affirmed the verdict thus obtained. The Supreme Court of the State made no finding of fact whatever. It did say as a conclusion of law that there arose out of the inquiry made by Robinson as to when and by what trains the horses could be moved, and the answer thereto, that if tendered by six o'clock they could be moved on a given train at nine or ten o'clock, a verbal shipment under common-law liability. The Supreme Court of the State recited that notwithstanding it found as a fact that Robinson with authority signed Moore's name to the shipping contract involved, the contract was ineffectual, because the agent did not tell Robinson that which was patent to his own eyes, and that with which he was familiar as a matter of experience, to wit, that there was a limitation of liability provision in the contract. To hold the deliberately executed agreement of the parties invalid under these circumstances is not to make a finding of fact, but to apply an erroneous legal conclusion.

II.

The plaintiff contended that he was entitled to special damages for failure to move the mare Nancy Alden upon a particular train, the special damage being the failure to enter the mare in the races of September 17. Proof was submitted in support of this demand, and the court permitted it to go to the jury without any instructions eliminating such proof; that such a proceeding is reversible error is settled by this court in *Chicago & Alton Railroad Company vs. Kirby*, 225 U. S., 155.

III.

The Supreme Court of the State of Oklahoma in effect held that the plaintiff had a right to have the case tried upon his own theory of an oral contract, and that the defendant did not have the right to make its defense upon its theory of a written contract, and this notwithstanding the fact that Robinson swore that he signed Moore's name to the contract and Moore swore that Robinson was authorized to sign the same.

In conclusion the defendant now insists, and has at all times insisted that the measure of its liability must be determined under the Act to Regulate Commerce, as applied to the written contract pleaded in its answer, and the execution of which is admitted by the plaintiffs. The trial court and the Supreme Court of Oklahoma persistently proceeded upon the theory that they had the right to ignore the Act to Regulate Commerce and the rights of the defendant thereunder. It is respectfully submitted that no case that has come to this court evidences a greater determination upon the part of the court to deny to litigants all benefits of the Act to Regulate Commerce than does the case at bar.

S. T. BLEDSOE,
Attorney for Plaintiff in Error.





16
Offices Supreme Court, U. S.
FILED.

AUG 12 1913
JAMES H. MCKENNEY,
CLERK.

IN THE
SUPREME COURT
OF THE
UNITED STATES

The Atchison, Topeka and
Santa Fe Railway Com- }
pany, *Plaintiff in Error.* } NO. **451.**
vs.
H. F. Moore, et al.,
Defendants in Error.

BRIEF OF DEFENDANT IN ERROR

—
H. H. SMITH,
Attorney for Defendant in Error.



IN THE
SUPREME COURT
OF THE
UNITED STATES

The Atchison, Topeka and
Santa Fe Railway Com- }
pany, *Plaintiff in Error.* } NO.
vs.
H. F. Moore, et al.,
Defendants in Error. }

MOTION TO DISMISS OR AFFIRM.

At October, 1913, Term.

Comes now the defendant in error by his coun-
sel appearing in that behalf, and moves the Court
to dismiss the writ of error herein, for the reason
that there can now be no actual controversy invol-
ving the real and substantial rights between the

parties to the record, because this Court has passed on all material questions raised therein, and determined them adversely to the contention of the plaintiff in error; and further, for the reason that by virtue of the determination of this Court, said writ of error is without merit; and further, for the reason that by virtue of the determination of this Court, this said writ of error and proceedings thereunder remain only for the purpose of delay.

And the said defendant in error in support of said motion, alleges and says, that the defendant in error brought said action originally on the carrier's breach of its obligation to carry within a reasonable time, and exercise reasonable care in the handling of said shipment, and the oral understanding therein entered into at said time in the City of Kansas City, was found by the jury to be the real contract between the parties to the shipment, the plaintiff in error and the defendant in error herein; and that said oral agreement was one not merged into, any legal and binding written agreement; and that by the terms of said oral understanding, no limitation was expressed on the liability of the value of the mare shipped, and no rate of freight was agreed upon, and none paid at

said time, but that at the destination of the shipment, without any express rate of freight being agreed upon, except the rate which applied to race horses of value, which rate was collected by the plaintiff in error, of the defendant in error; and if, according to the determination of said jury, and the finding of the Supreme Court of the State of Oklahoma, the said rate so collected, was not the rate in existence that governed said shipment, then the said plaintiff in error is remitted to a collection of the difference between said rate so collected, and the said rate governing said shipment, and the said defendant in error has not objected or refused to pay said rate, and on the contrary, stands ready and willing so to do; and further, that the plaintiff in error has never demanded or brought any action to recover said sum due on said shipment, if any there is.

That the Supreme Court of the State of Oklahoma, found and adjudged that the issue presented under the pleadings to the jury in the trial of said cause, was, that said shipment moved on said oral understanding, and no other contract, valid or binding on the defendant in error was made; and further, the said Supreme Court of the State of

Oklahoma, found and adjudged that the plaintiff in error by its answer pleaded, that the contract was made in the State of Missouri, and was governed by Missouri law, which issue was joined by the defendant in error, and the said issue so joined was supported by proof of the plaintiff in error and defendant in error, and submitted to the jury. That the submission of this issue was purely a question of practice, and may not be interferred with by this Court. That the Supreme Court of the State of Oklahoma affirmed the judgment of the trial court upon the issue so presented by the plaintiff in error and joined by the defendant in error, and affirmed the judgment of the trial court entered thereon, so that no federal question was presented in the determination of the merits of this case, either in the trial court, or in the Supreme Court of the State of Oklahoma, but that the same was decided exclusive of any federal question, and upon an issue presented by the plaintiff in error itself, making it unnecessary to construe the "Hepburn Act." This being so, this Court is without jurisdiction to enter of record and determine any question involved in this cause, except as to the jurisdiction of this Court, and upon the judgment of the Supreme Court of the State of

Oklahoma, on the facts, that no federal question was involved, this Court is bound, and cannot examine the record as to the facts, but will be guided by the finding and judgment of the Supreme Court of the State of Oklahoma; and the defendant in error by counsel aforesaid, also moves the Court to affirm the said judgment of the Supreme Court of the State of Oklahoma, from which Court said writ of error was certified, because, although the record in said cause may show that this Court has jurisdiction in the premises, yet, it is manifest by the decisions and determinations of this Court, now clearly governing this case, and the question on which the jurisdiction of this Court depends, is now so frivolous as not to need further argument or authority, or abstract of the record, and that this case is now pending in this Court for delay only. That the defendant in error have judgment for costs and 10 per cent damages for hinderance and delay..

H. H. SMITH,
Attorney for Defendant in Error.

Messrs. Cottingham & Bledsoe,
Oklahoma City, Oklahoma,
Attorneys for Plaintiff in Error:

Please take notice that on the day of

October, 1913, or as soon thereafter as counsel can be heard, a motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for the decision of the Court thereon, on the grounds set out in said motion.

Annexed hereto is a copy of the brief or argument in support of said motion.

Attorney for H. F. Moore, Defendant in Error in the trial court, and for the purpose of this motion.

Service of the foregoing motion to dismiss or affirm, and the annexed brief or argument, acknowledged this the day of July, 1913.

Counsel for the Atchison, Topeka & Santa Fe Railway Co., Plaintiff in Error.

IN THE
SUPREME COURT
OF THE
UNITED STATES

The Atchison, Topeka and
Santa Fe Railway Com- }
pany,
Plaintiff in Error. } NO.....
vs.

H. F. Moore, et al.,
Defendants in Error. }

**BRIEF OF DEFENDANT IN ERROR ON MOTION
TO DISMISS OR AFFIRM.**

This case is now before this Court on a motion by the defendant in error to dismiss or affirm. From the Supreme Court of the State of Oklahoma, error was certified to this Court. The error assigned is a pretended construction of a federal statute, namely: "Hepburn Act."

STATEMENT OF THE CASE.

This action was begun in the District Court of Lincoln County, Oklahoma, on the 29th day of July, 1908, by H. F. Moore et. al., to recover of the Atchison, Topeka and Santa Fe Railway Company, damages for injury to the racing mare, Sousa Mc, from Kansas City, Missouri, to Lawrence, Kansas, in 1908; trial by jury was held April 20th, 1911, and verdict for plaintiff returned in the sum of Fifteen Hundred (\$1500.00) Dollars. Motion for new trial overruled; error certified by Supreme Court of Oklahoma, in 1912.

ASSIGNMENTS OF ERROR.

THE ASSIGNMENTS OF ERROR ARE BROADLY, THAT THE SHIPMENT MOVED UNDER THE HEPBURN ACT, BEING INTER-STATE COMMERCE TRAFFIC, AND THAT THE COMMERCE ACT DID NOT RECOGNIZE VERBAL CONTRACTS. That a valid contract of shipment was signed by H. F. Moore which granted to him a reduced rate as consideration for a limitation of liability, which limitation of valuation

was to the sum of One Hundred Dollars, in case of damage to the mare, no rate of freight being expressed in the contract. That the trial court erred in admitting testimony of the actual value of the mare.

THE PLEADINGS.

The defendant in error filed petition relying on the oral understanding between the parties hereto, and for breach of the common law obligation to CARRY SAFELY and WITHIN A REASONABLE TIME. Plaintiff in error filed demurrer, which was overruled, and then it filed answer setting up that the contract entered into was a Missouri contract, and was controlled by Missouri law.

Thereafter defendant in error filed motion to strike which was overruled, then plaintiff in error filed an amendment to original answer setting up that the interstate act controlled the shipment, still contending for the defense of a Missouri contract controlled by Missouri law, and a contract of shipment controlled by the commercee act. The court overruled motion to strike, and defendant in error filed reply. Plaintiff in error relied on its original answer to which defendant in error joined issue, and on the trial of said action, both introduced

evidence and depositions on the law of Missouri, according to the original answer, and plaintiff in error also introduced evidence as to the interstate commerce rate, to which defendant in error objected principally on the ground that the issue presented did not make it necessary or competent to prove said rate it not being pleaded or shown that the shipment moved as a carload shipment. The trial court submitted the issue thus raised to the jury, that the jury might determine as matter of fact whether the shipment moved under the written contract pleaded in plaintiff in error's answer, or whether the same moved under oral understanding, set out in defendant in error's petition, and the issues were so made. The question of fraud or arbitrary exaction being set up against the written contract pleaded, which contained limitation clause. The trial court submitted the issue of its execution to the jury, and the bona fides of the transaction—the jury found against the written contract, and returned a verdict for the actual damage to the mare and in favor of the oral agreement. The case was appealed to the Supreme Court of Oklahoma, for its determination, and the finding of every issue made in the trial court was affirmed as to facts and law.

The following objection, page 228 case-made, of defendant in error to plaintiff in error's evidence, state the ground of fraud.

Findings on the Pleadings by the Supreme Court of Oklahoma.

"Numerous errors are assigned by appellant, but all are disposed of under the two general propositions, viz: First, whether the railway company was entitled to judgment on the pleadings, having set up a written contract, the execution of which was not denied under oath; second, were the provisions in the written contract valid and were they binding on the shipper?

As to the first proposition, the plaintiff did not RELY ON A WRITTEN CONTRACT of any character, nor did he sue for violation of the terms of a written contract, but alleged the shipment to have been made under a definite VERBAL CONTRACT IN WHICH NO REFERENCE WAS MADE TO THE FREIGHT RATE OR LIMITATION OF LIABILITIES, and sought recovery on the grounds of the gross negligence of the company in the manner of handling the shipment. This presented the material issues to be tried, a determination of which in favor of plaintiff would entitle him to recover and which were joined by defendant in its general denial of the allegations in the petition. The plaintiff therefore was entitled to have these issues tried and determined, and in the trial of same was entitled to all the competent, material evidence at his command in support of his view of such issues. Therefore, the setting up of a written contract

by defendant did not preclude the plaintiff from his right to have such issues determined, nor entitle defendant to judgment on the pleadings, notwithstanding plaintiff had failed to deny the execution of the contract under oath. If plaintiff had stated a cause of action, which in our opinion was done, he had a right to have same determined upon the theory he had chosen—upon the grounds of his own choice. *And, not relying on a written contract, not suing on a written contract, but claiming the shipment to have been made under a verbal agreement, and relying for recovery on the carrier's common-law liability for negligence, he should not be required to abandon his chosen grounds and to try his case upon a different theory by the setting up of a written contract, unless such contract constituted a prima facie defense to his action.* Whether it did or not depended upon the question that it was the only contract, which question was one of fact, and was completely answered by a determination of the issues tendered in the petition, "that the shipment was made under a verbal contract." Hence, the decisive issues tendered by both the petition and the written contract being disposed of by a determination of the issues presented by the petition, it is immaterial whether the execution of the written contract be denied under oath or not, or whether or not plaintiff's reply was verified. It was held by this Court in *Flesher v. Callahan* 32 Okl. 283, 122, Pac. 489, that section 5648 Comp. Laws 1909, "providing that allegations of the execution of written instruments and indorsements thereon shall be taken as true unless the denial thereof be verified by

affidavit, requires the verification of the denial of the execution only." The execution of the instrument in question here was not in issue. Therefore it was not error to overrule defendant's motion for judgment on the pleadings."

Extract from opinion of said court, 129 Pac. 22, verified by original opinion.

Findings of the Supreme Court of Oklahoma, 129 Pac. 23, verified by original opinion, as to the facts tendered in issue in the trial court.

"The record in this case clearly shows negligence on the part of the railway company. Hence the remaining question is: Was the liability of the company limited to the value fixed in the written contract? *A determination of this question depends upon whether the value was fixed by the shipper and whether such value was fairly agreed upon between the shipper and the agent of the carrier.* This question may properly be determined without the necessity of construing the federal statute, known as the "Hepburn Act."

The question here is not a question of law as to whether the carrier had authority to limit its common-law liability to a value fixed by the shipper and fairly agreed upon between the shipper and carrier, but is a question of fact whether such

value was fixed by the shipper and whether it was fairly agreed upon between the parties. If, as a matter of fact, such value was not fixed by the shipper and was not fairly agreed upon by the parties, but was arbitrarily printed in the contract by the carrier without the knowledge or even the implied assent of the shipper, then the carrier's liability is not limited to such value and there is no necessity for a construction of the federal act. Therefore the issue, being one of fact, was properly determinable by the jury, from the evidence, and we think the verdict was fairly and reasonably supported by the testimony submitted. But it is contended by the company that the court erred in admitting testimony which tended to vary the terms of the written contract. If there had been no other issue to be tried, except the validity of the written contract, the contention might be well taken. But there were other issues independent of the written contract, and decisive of plaintiff's right of recovery, on which plaintiff relied and had a right to have determined and a right to introduce any testimony relevant, competent and material to a correct determination of such issues. And if the evidence offered was competent and

material to a determination of such issues, and was offered for such purpose, it was not error to admit same, although it may have had the consequent effect of varying the terms of the written contract; for, as stated in the discussion of the first proposition, plaintiff had tendered the issue, "that the shipment was made under a verbal agreement and that the company was guilty of gross negligence," and relied on these grounds for recovery. THE DEFENDANT BY GENERAL DENIAL JOINED THESE ISSUES, thereby giving plaintiff the right to have them determined, although the conclusion may have followed, as a logical sequence, that the terms of the written contract were not fairly entered into. C. R. I & P. Ry. Co. v. Spears, *supra*, is in point on the question of admission of evidence.

As to whether the printed contract superseded all others, or whether the verbal agreement was merged in the printed contract, THE EVIDENCE WAS CONCLUSIVE THAT A DEFINITE AND COMPLETE AGREEMENT IN REFERENCE TO THE SHIPMENT WAS MADE OVER THE PHONE by the shipper AND THE AGENT OF THE CARRIER WITHOUT ANY MENTION OR

REFERENCE TO THE RATE, THE VALUE OF THE STOCK, FURTHER THAN THAT IT WAS RACING STOCK, OR TO ANY LIMITATION OF LIABILITY OR ANY MENTION OF THE FACT THAT A WRITTEN OR PRINTED CONTRACT WOULD BE REQUIRED. THE TESTIMONY OFFERED BY DEFENDANT SUBSTANTIATES THIS VIEW AND CORROBORATES THE TESTIMONY OF PLAINTIFF ON THOSE POINTS. It also shows clearly that the stock was loaded, the car closed and tagged "Red Ball" THE SHIPMENT fully delivered TO THE CARRIER AND CONTROL OF SAME COMPLETELY SURRENDERED BY THE SHIPPER, AND THAT AFTER THE CAR HAD BEEN MOVED FROM THE PLACE OF LOADING AND STARTED IN TRANSIT, ALL PURSUANT TO THE VERBAL AGREEMENT, SOME TWO HOURS THEREAFTER, THE AGENT OF THE COMPANY PRESENTED TO THE SHIPPER THE PRINTED CONTRACT, WITHOUT CALLING HIS ATTENTION TO ITS SPECIAL PROVISIONS AND WITHOUT INFORMING HIM THAT IT CONTAINED provisions directly at va-

riance with the terms of THE VERBAL AGREEMENT, and without giving him an opportunity to examine its contents and exercise his right of choice.

Under these circumstances, having made a definite and complete agreement as to the shipment, without mention of rate or limitation of liability, having surrendered certain of his rights, and certain rights having accrued to him under such agreement, it was reasonable for him to assume that the printed contract presented to him under such circumstances contained no provisions which would take away the rights already accrued. A. T. & S. F. Ry Co. v. Dill, 48 Kan. 210, 29 Pac. 148; K. P. Ry. Co. v. Reynolds, 17 Kan. 251; Railway Co. v. Lockwood, 17 Wall. 267, 21 L. Ed. 627; Hart. v. Railroad Co. 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Bostwick v. Baltimore & Ohio Ry. Co. 45 N. Y. 712; Swift v. Pacific Mail & Steamship Co., 106 N. Y. 206, 12 N. E. 583; M. K. & T. Ry. Co. v. Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073; S. L. & S. F. Ry. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637; Louisville, etc. Ry. Co. v. Craycroft, 12 Ind. App. 203, 39 N. E. 523; Gulf Ry. Co. v. Wood (Tex. Civ.

App.) 30 S. W. 715; Louisville etc. Ry. Co. v. Meyer, 78 Ala. 597; Strohn v. Detroit, etc. Ry. Co., 21 Wis. 554, 94 Am. Dec. 564."

"Now in the case at bar, up to and including a complete consignment and surrender of control of stock by the shipper, the starting of the shipment in transit and the assumption of liability for negligence by the carrier every move made, every step taken toward the shipment, was under and pursuant to a parol contract. Under these circumstances the shipper had the right to assume that his stock would not be grossly abused and to act on the faith thus inspired, and rely on the rights thereby accrued to him, and the carrier will not be permitted to take away those rights and relieve itself of the liability thus incurred, without having given him a fair opportunity to assent thereto.

The record discloses that such opportunity was not given. Therefore the verbal contract must control. There being no agreement in the verbal contract as to the extent of limitations of liability, the carrier is held to its common-law liability for negligence. There is no controversy as to the value of the animal, the extent of the injuries, nor

the damage thereby sustained. The allegation of negligence being fairly sustained by the evidence, we see no reason why the verdict should be set aside.

The judgment is therefore affirmed."

ARGUMENT.

Little need be said.

A motion to dismiss or affirm under the circumstances herein is proper and should be granted. The shipment having moved on the parol agreement which was lawfully entered into, and no rate of freight being agreed on, and no limitation being agreed to—the rate of freight which said shipment moved on may be presumed to be the regular rate on that character of shipment. This being determined as a question of fact, the Supreme Court of the United States will not inquire into the same, but the findings of the Supreme Court of Oklahoma, became a question of law to this Court, and are not re-viewable.

Hilton v. Dickman, 10 U. S. 165.

United States v. Burchard, 125 U. S. 178.

Carter v. Inter-Ocean Ins. Co. 554.

Rule 6 of this Court 2.

Where the jurisdiction of this Court is doubtful, a motion to dismiss or affirm, is proper.

N. Y. & N. E. Ry. Co. v. Bristol, 151
U. S. 555.

So. R. Co. v. Carson, 194 U. S. 136.

If the issues were made and trial had, without involving federal question, the Supreme Court of the United States will sustain motion to dismiss—the construction of state law by state court being conclusive and binding on this Court. The parol contract to charge the rate posted, required by the Commerce act, or the regular rate, as must be assumed from the findings on the evidence held to be legal and proper by the Supreme Court of Oklahoma, is not in conflict with the Federal act. Robinson did not contract for an advantageous rate, and it was the railroad company's business to collect the regular rate—this Court clearly distinguished this case in Railway Co. v. Kirby, 226 U. S.

"The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise, when the action is for a breach of a contract to carry within a particular time, etc."

It will thus be seen that this is not a special contract for a particular train or in a particular train, and the action was for a breach of the

carrier's obligation to carry safely and in a reasonable time, or "upon the liability of the carrier otherwise" than on a special agreement. The Railway Company may collect the difference between the rate collected, and the one required under the interstate act—that act does not contemplate any kind of contract, only a particular

[redacted]

class of rates.

Railroad Company v. Abilene Cotton Oil Co., 204 U. S. 426.

Merchants Cotton Press Co. v. Insurance Co., 151 U. S. 368.

The whole action was purely on "the carrier's liability for negligence in not promptly shipping and delivering."

for want of jurisdiction as this case, & failed
The motion to dismiss or affirm must be suspended any federal question necessary in the determination of the issues in the case.

The Supreme Court of the United States will not take jurisdiction of a case decided on a theory not necessary to determine a federal question.

Case Mfg. Co. v. Soxman, 138 U. S. 431.

Final Judgments of Highest Court.

"Whenever the highest court of a State, by

any form of decision, affirms or denies the validity of any judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a ~~Federal~~ question, will upon a proper proceeding attach."

Williams v. Bruffy, 102 U. S. 248.

Federal Questions.

"The jurisdiction of the Supreme Court may be invoked where the defendant claimed rights under a Federal statute, and that statute was referred to in and was an element of the decision of the State court."

Atlantic Coast Line Co. v. Riverside Mill Co. 40 L. R. A.

Hammond v. Whittredge, 204 U. S. 547.

"As to when the question may be raised, see Forbes v. Virginia State Council, 216 U. S. 399. Where the disposition of a Federal question was not necessary to the determination of the cause and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained."

Rogers v. Jones, 214 U. S. 204. See also Leathe v. Thomas, 207 U. S. 93; California Powder Works v. Davis, 151; Gaar, Scott & Co. v. Shannon, 223 U. S. 468.

Questions of Fact.

"On a writ of error the Supreme Court does not deal with the facts. *King v. West Virginia*, 216 U. S. 100. But it accepts the findings of the court of the State upon matters of fact as conclusive, and reviews only questions of Federal law within the jurisdiction conferred upon the Supreme Court."

Waters-Pierce Oil Co. v. Texas, 212 U. S. 97; *Chrisman v. Miller*, 197 U. S. 319.

The submission to the jury by the trial court, the issue of the contract, whether it was a verbal or written contract, was a matter wholly within the discretion of the Court, and merely because the issue was pleaded and presented, that the shipment was an interstate shipment, did not make it necessary for the Court to decide any Federal question. The discretion of the Court was not abused. Decisions of the Court below cannot be examined in this court, except in cases of gross abuse. Generally, where the action of the inferior court is discretionary, its decision is final.

The submission of the trial court of the contract to the jury, was a matter of practice in this jurisdiction, and is not reviewable by the Supreme Court of the United States.

See: *Earnshaw v. United States*, 146 U. S. 60; 31 L. Ed. 87; *Parsons v. Bedford*, 3 Peters, 433, 7 L. Ed. 732.

The general rule is well settled that amendments are discretionary with the court below, and therefore the allowance or refusal of pleadings or amendments to pleadings by the trial court, is not reviewable in the Supreme Court. MATTERS OF PRACTICE IN INFERIOR COURTS DO NOT CONSTITUTE SUBJECTS UPON WHICH ERROR CAN BE ASSIGNED IN THE APPELLATE COURTS.

Parsons v. Bedford, supra.

This court cannot review the evidence in any case. That is a matter for the trial court, so that the Supreme Court of the United States could have no jurisdiction when the issues presented were entirely for the trial court; and it has been decided where there was any evidence upon which such findings could be made, or whether there was any evidence, that is a matter for the Supreme Court of Oklahoma.

Case Mfg. Co. v. Sovine, 105 U. S. 431; *the Francis Wright*, 105 U. S. 381.

This conclusiveness of the facts found, extend to the findings by state courts to whom they have been submitted by waiving a jury, or by trial by jury, or to a referee, where they are so held by state courts under state laws.

Boggs v. Mining Co. 3 Wall. 304; 18 L. Ed. 245.

Under the act of Congress of March 3, 1865, authorizing the trial of facts by the Circuit courts, and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, the Supreme Court sitting as a Court of error cannot pass, as it does, in equity appeals, upon the weight or sufficiency of evidence. This court has often held that for all the purposes of their review, the facts as found and stated by the Court below, are conclusive.

It will be seen by the court that there is no issue presented here for the decision of this court. The theory of the plaintiff in error was, that the trial court should have sustained the written contract as a matter of law. It is manifest that inasmuch as a question of arbitrary exaction or fraud was raised in the pleadings, and the question of fact was presented thereon which contract gov-

erned the shipment, the court manifestly had the right to submit to the jury the question, whether or not the written contract was obtained by duress or fraud, or whether the shipment moved by verbal contract. The Supreme Court of Oklahoma sustained the finding of the jury, and trial court. The trial court presented to the jury in instruction No. 1, the verbal contract, page 415 case-made.

"The plaintiff in this action contends that the defendant undertook to transport the mare Sousa Me to the City of Lawrence, from the City of Kansas City, in a reasonable time, and that she was being transported on the part of plaintiff for racing her there in races."

In Instruction No. 2, page 416 case-made, the plaintiff in error's contract was submitted to the jury, in which the Court said, that if defendant in error, C. E. Robinson, signed the name of one H. F. Moore, to a contract, in which contract plaintiff agreed, that in consideration of a limitation of the value of said mare, in case of injury, to a sum not exceeding \$100.00, that he was granted a reduced rate, etc., he was bound by such limitation.

In Instruction No. 7, case-made 417, the Court presents the issue relative to the plaintiff in error's contention in the following instruction:

"As to the contract pleaded by the defendant in its answer, alleged by it to have been executed by the plaintiff in this case, I instruct you as follows: That if you believe from the evidence that at the time of the shipment of the mare, the contract of shipment was entered into between the plaintiff, Robinson, either by him or any one for him and he, Robinson, represented to the defendant or its agents at Kansas City, that the value of said mare did not exceed one hundred dollars, and that the defendant through its agents at Kansas City, relied on said representation of value so made, and granted by reason thereof to the plaintiffs, a rate less than the regular rate for this class of shipments, on said mare, and was misled by said misrepresentations of plaintiff as to the value of said mare, in fixing said rate, and was induced to fix a lower rate than the regular rate, if you find there was a lower rate fixed on said mare than the regular rate, then you are instructed that if you find the defendant guilty of negligence, and that such negligence was the proximate cause of the mare's injuries, you are limited in your findings to the sum of one hundred dollars.

But if you find that representations of value of said mare were not made by the plaintiff or his agents, but that the same was arbitrarily inserted by defendant, or its agents at Kansas City, or printed in said contract when Moore's name was signed to it, you are instructed that plaintiff is not bound by the limitation of one hundred dollars, and you will find the actual damage which plaintiff has incurred by reason of the injuries to said mare, if any, not exceeding the sum of \$1875.00."

Defendant excepts to the giving of the above instruction.

It becomes clear then that the plaintiff in error has not been deprived of its rights, nor has it presented in the entire case, a Federal question, for the court had the right to present to the jury the issue of the pleadings, viz: whether the shipment moved on the verbal contract pleaded by defendant in error, or the written contract pleaded in the answer. The mere fact that the Railway Company did not collect the rate of fare which it is entitled to collect, has nothing whatever to do with the determination of the issues in this case. The court did not pass upon, and it did not hold that the terms and conditions of said tariff so filed with the Interstate Commerce Commission, were not binding upon the defendant in error. The contention of the plaintiff in error is that the court refused to instruct the jury, that the written contract was binding as a matter of law, and merged the oral agreement, which, under the issues presented, the Court could not do. The merging of the contract agreed and presented by plaintiff in error as controlled under Oklahoma statute where this cause was tried. They are bound by the de-

cision of the Oklahoma Supreme Court. The allegation of the amended petition of the defendant in error sets up the fact: "that said conversation and agreement was MADE ORALLY, NOT IN WRITING, and in pursuance of said agreement and conversation, said clerk directed this plaintiff, C. E. Robinson, to load said horse between the hours of four o'clock and six o'clock, at the platform of their yards at the receiving freight office in said city, county and state. * * * But the defendant failed to convey said mare according to said agreement, promise and conversation."

At the time the mare was shipped, when this oral agreement was made, the defendant in error alleges: "and the said defendant, its agents and servants, were informed by this plaintiff that the said mare, Sousa Mc, was a race mare, and she was being shipped there for the said purpose." So that the verbal contract which was found by the Supreme Court of Oklahoma, to have been properly pleaded and sustained by evidence, is the only contract with reference to this shipment, that may be considered by this court at this time. This contract was permissible under the laws of Missouri. The defendant denied this verbal contract

by general denial, and pleaded that a written contract was entered into in its answer at page 46, case-made, and it alleged that said contract was the only contract entered into and executed by said parties; thus, it made the issue, whether or not it was the only contract.

At page 54, case-made, the plaintiff in error tenders the issue that said contract was executed in the State of Missouri; that said contract is a Missouri contract, and continues to allege that said contract was valid and legal under the laws of Missouri. It also sets up the laws of Kansas, as controlling said contract in part, owing to the contract being partially performed in that state.

At page 76, case-made, it filed its amended answer, wherein it alleged that the shipment was an interstate shipment; that the same was controlled by the Interstate Commerce Act, and that the rates specified and filed with the Interstate Commerce Commission controlled this shipment. It also alleged there is a controversy between the plaintiff and defendant, and that to determine said controversy, required an adjudication of the act of Congress known as the "Hepburn Act."

Manifestly, if this contract was not the con-

tract entered into between the parties as matter of fact, there is no conflict here between the parties to this action that involve either a construction of, or conflict with the "Hepburn Act." That act does not prohibit a verbal agreement at the regular rate.

The testimony of the witnesses agree, and the court finds that an oral agreement was made, and on this question the evidence is not only conclusive, but conclusive on this Court by the finding of the Supreme Court of Oklahoma. Admitting that this was an interstate shipment, and certain rates are fixed by the Interstate Commerce Commission, the question of fraud, whatever its form, in connection with said contract, is still a question of fact, on which the judgment of the Supreme Court of the State of Oklahoma is final, and if said written contract was fraudulently procured or arbitrarily exacted, and without containing the terms of the verbal agreement, and was not the real agreement on which the shipment moved, then, the Railway Company is remitted to a suit to recover the difference between the rate collected, and the Interstate Commerce rate.

Although the evidence is not for this Court

here, we suggest: at page 145, case-made, Robinson testifies as follows:

"Q. You may tell the jury whether you ordered the car yourself for this shipment?

A. I phoned from the Elmridge race track at noon for a car.

Q. You know who you talked to?

A. I called for the agent; I don't know who answered, he said he was the agent.

Q. What did you say to him?

A. I told him I had a bunch of race horses, I wanted to ship to Lawrence, Kansas, in time to race them, and wanted them in good shape. He told me he could get them out at nine o'clock that night, and have the horses loaded at four o'clock.

Q. What did you do then, what did you do after that?

A. We took the horses down and put them in Hunter's Transfer barn at noon.

Q. What time did you load them?

A. At six o'clock.

Following this conversation, is related a conversation at the yards in reference to the time the freight train left Kansas City, and a repetition of the conversation had over the phone, that the horses were race horses; that defendant in error

was anxious to get them there in time for the races; not a word about the rate of freight, or a written contract.

Robinson also testifies at page 180, case-made, when he got to Lawrence, Kansas, the point of destination, he sought the agent and had a conversation with him:

“Q. What conversation—just give the conversation you and the agent had?

A. I asked the agent what the freight was, and he told me to talk to the cashier.

Q. Well, did you talk to him?

A. I talked to the cashier, and asked him what the freight was, and he said he didn't know. He said the conductor that went through the night before on the red ball freight—I said that the cashier told me that the conductor that went through the night before took the bill through with him and he had no bill, and did not know what the freight was, and did not know what to charge us until that conductor came back and give him the bill. He told us he would collect twenty dollars and if there was any more he would collect that afterwards”

Now there is no clear evidence in the record as to the amount that was collected, unless it may be said that a preponderance of the testimony

shows that the rate, \$17.50, was collected, but this sum was never brought to Robinson's or Moore's attention until after the plaintiff in error knew that the horses were injured.

Mr. DuBois, the agent of the plaintiff in error, testifies at page 271, in reference to the way-bill.

At page 280, case-made:

"Q. Do you recollect what kind of a looking man signed it?

A. No, sir.

Q. Did he say anything to you about wanting a reduced rate?

A. No, sir.

Q. No conversation whatever was there about a reduced rate, Mr. DuBois?

A. No, sir.

Q. What did he say when he said he wanted to ship those horses just state the conversation?

(Answer stricken).

Q. Did you have any conversation with him prior to the signing of the contract?

A. No, sir.

Q. When did he sign this contract?

A. Why, I think it was about eight o'clock in the evening.

Q. Two hours after you went on duty?

Q. You go at six o'clock?

A. Yes, sir.

A. Yes, sir.

Q. The horses had already been loaded had they?

A. Yes, sir."

It will be remembered that Robinson testifies that the horses were loaded at six o'clock, and had already started on their journey. This contract was signed at eight o'clock, and it must be agreed that this is a fact upon a reading of the record. Then he is asked if any arrangement had been made with him to ship those horses, at page 284:

"Q. Horses were then already loaded?

A. Yes, sir.

Q. Had he made arrangements with you to ship those horses before that time?

A. No, sir."

In reference to the contract which the Railroad Company put up on Robinson, or attempted to be substituted for the original agreement, he testifies as follows: Case-made, page 281:

"Q. I will ask you to state what rate is speci-

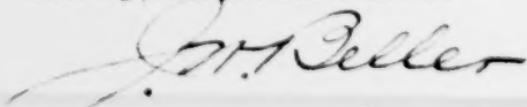
fied in the contract, that was signed there at that time by Mr. Moore?

A. There is no rate specified in the contract."

It will therefore appear from the evidence, although this court will not consider the evidence in this case, that no rate of freight was ever brought to the attention of these parties, either by the purported contract which this agent, Du-Bois, attempts to substitute for the verbal agreement, or in the verbal agreement.

It may be assumed therefore that the defendant in error agreed and expected to pay the regular rate for horses of that character. On this evidence alone quoted, the Court may find that the judgment is sustained by evidence. The Supreme Court of the State of Oklahoma find on these facts that the shipment moved by verbal agreement; that this agreement was complete, final and effectual. Hence we say, there was no occasion for either the trial court or the Supreme Court of the State of Oklahoma, to decide any Federal question. This being so, this Court has no jurisdiction, and the motion to dismiss must be sustained.

H. H. SMITH,
Attorney for Defendant in Error.

A handwritten signature in cursive ink, appearing to read "H. H. Smith" or "H. H. Beller".

Office Supreme Court
FEB 26 1911
FEB 26 1911
No. 451.
JAMES D. MAINE

IN THE SUPREME COURT OF THE
UNITED STATES

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Plaintiff in Error,

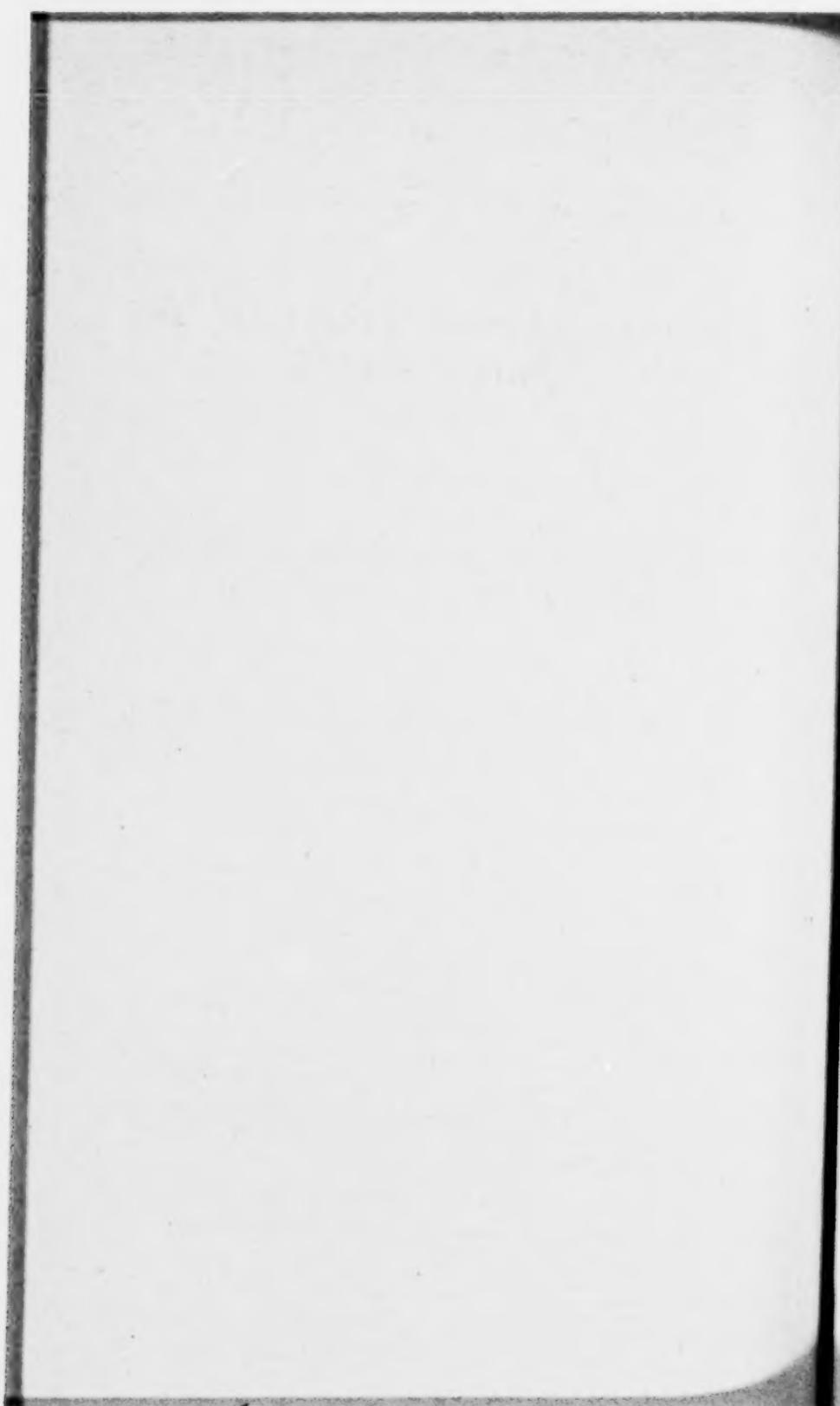
VS.

H. F. MOORE, et al, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

H. H. SMITH,
Attorney for Defendants in Error.

Shawnee Printing Company, 231 N. Bell St., Shawnee, Okla.



IN THE SUPREME COURT OF THE UNITED
STATES.

No. 451.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Plaintiff in Error,

VS.

H. F. MOORE, et al, Defendants in Error.

BRIEF AND STATEMENT OF DEFENDANTS IN
ERROR.

STATEMENT.

This action is to recover on an oral agreement to ship the mare in controversy from Kansas City, Missouri, to Lawrence, Kansas, on the 17th day of September, 1907.

The following facts may be agreed as settled in this case:

That the petition alleges (record page 20) that an oral agreement was made to ship said horses. That

the said mare in controversy was injured on account of the negligent and careless handling of said mare. That the said mare was delivered to the plaintiff in error about 4 o'clock, of the 17th of September, 1907. That there was no agreement as to the rate of freight; that no rate of freight is specified in the alleged written contract; that the rate of freight was unknown to the shippers. That the original agreement was begun by conversation of H. H. Smith, over phone with the Chief Clerk of the Santa Fe Office at Kansas City, Missouri, (R. 125) concluded by conversation with Robinson at track, and in any event at the yards at the time the horses were loaded.

See also Moore's testimony, page 64, R.

Q. Did you have a contract?

A. I did not, but presume Mr. Robinson had one.

Q. What time of the day did you load the horses?

A. We loaded them about 6 o'clock, or half past on September 16th, 1907.

Q. You say you did not secure a bill of lading or shipping contract for these horses?

A. I did not.

Page 65 R.

Q. I ask you to examine the paper I herewith hand you, which is marked by the stenographer Exhibit "A" and state whether you have seen it before?

A. I have never seen it before that I can remember of.

Q. What time of the day did you move from the Darick track to Argentine?

A. About 10 o'clock, or maybe a little before.

Q. These horses were placed in the car about 6 o'clock at Kansas City?

A. Yes sir.

Q. Did you have the horses at the freight office when you made arrangements to ship to Lawrence?

A. No sir, we made arrangements for the car before we brought the horses down.

Q. Did you or did Mr. Robinson, talk with more than one party at the depot at Kansas City, when you arranged for the shipping of the horses at Kansas City?

A. I do not know.

Q. You were with him all the time were you?

A. Most of the time, but I was in the car part of the time while he was up there.

Q. You knew that this shipment moved on a reduced rate of freight did you not?

A. I can't say that I did, because I didn't.

Q. Did you tell the Clerk or Agent, that you wanted the reduced rate of freight?

A. No sir.

Q. What, if anything did you say about the freight?

A. I didn't say anything that I remember.

Q. Did the Agent say anything about the freight?

A. No sir, not that I remember.

Q. Did he say anything to Mr. Robinson?

A. No sir.

Q. Did Mr. Robinson say anything to him about the freight rate?

A. No sir, not that I remember.

Q. You can read, and had the opportunity to read this contract?

A. I can read, but never had the opportunity to read this contract.

(Then the live-stock contract is attached, and shows that the valuation clause to be signed by the shipper, and set out as a declared valuation agreement, was never signed by Moore; the main body of the

same, only being signed, as appears at page 145, original record.

"I or we, hereby declare the valuation of live-stock covered by the within contract, does not exceed for each mare \$_____, and the reduced rates as given, are based upon such valuation.

Shipper."

At page 99 R., Robinson testifies:

"I ordered a car about noon, over the telephone. Me and Mr. Smith together went to the telephone and ordered a car from the Santa Fe road. They told us to load the horses about four * * * * it was about six before the car was ready for us to load. We loaded the horses at six o'clock.

Q. Who was this you were talking to?

A. The Agent at Kansas City.

Q. In what place?

A. In the freight depot.

Q. The Agent of the freight depot, of the Atchison, Topeka and Santa Fe, were you?

A. Yes, sir.

Q. Now just state what was your conversation with him?

A. I told him I had race horses, and wanted to get off on a fast freight that didn't make any stops so we wouldn't be jerked around and would be in good condition, and they told us there was a red ball freight going at 9 o'clock, and they would put us on that, and we loaded with that understanding.

Q. Where did you have this conversation with the Agent?

A. In the office. In one of their offices, there is a good many offices there; the office where they write out the bills, make up the bills and contracts.

Q. Just state what the conversation was?

A. I told him we had race horses, and wanted to get to Lawrence in good shape, and wanted to go on a through freight, and he told us about the red ball freight, and told us he would put us on that freight, never said anything about any other kind of a freight.

Q. What did you say about going to Lawrence?

A. I told him we had a race there and wanted to go on a good freight, so they would be in good shape, and didn't want them knocked around.

Q. What time did you load the horses?

A. We had them loaded at 6 o'clock.

"I spoke to the switchman, and he said he did not know there were any horses in the box cars."

"I asked the Cashier at Lawrence what the freight was. He said he didn't know what the freight was, that the Conductor that went through the night before on the red ball that was supposed to carry us, took the bill on through with him, and he would have to wait until the Conductor came back before he could get the bill, and send me what the freight was. He said if we would pay him \$20.00, if there was any difference he would collect it the next day.

At page 122 R.

Q. When was it you had the conversation with the Agent in his office?

A. Well I had two or three conversations with him, one when I first got down there with the horses.

Q. What time was that?

A. About Two. And I had one about Three, and I was in the office there several times along all the afternoon.

Q. When did you make your arrangements about shipping—getting your contract?

A. Why that was after we had loaded the horses, I would judge about 8 o'clock.

Q. Now then all of these conversations took place there in the same office building, or the same room, were they?

A. Well I was talking to the Chief Clerk upstairs.

Q. You talked with the Chief Clerk upstairs?

A. Yes sir.

Q. Was that the same Clerk that signed this contract with you?

A. Oh no this was the Chief Clerk, its was a different department altogether.

Q. Is he the same man as the Agent?

A. No.

Q. What did you talk to him about?

A. I went up to talk with him about ordering the car, and about when it would be spotted and about one thing and another.

Q. Do you know whether he was the Agent of the Company or not?

A. He said he was.

Q. Did you have any conversation with the Chief Clerk at the time you signed the contract?

A. No sir.

At Lawrence, Kansas, page 115 R.

Q. Did you sign any freight receipt?

A. No sir, I never signed any receipts there myself at all.

Q. And didn't get any?

A. No I didn't.

Q. Do you know just how much the freight charges were on this shipment?

A. Yes sir.

Q. How much?

A. \$20.00 besides the \$2.60 they collected afterwards.

Q. Do you know who paid the \$2.60?

A. Yes sir.

Q. Who?

A. Mr. H. H. Smith.

At page 117 R. on cross examination, Mr. Robinson again testifies that he had the several conversations with the Agent, and no contract and no rate of freight was agreed upon, and none requested.

Q. Did he say anything about giving you a reduced rate or, about valueing the mare at \$100.00?

A. He said nothing about a reduced rate, or about the value of the mare.

Q. Did you ask him anything about giving you a reduced rate?

A. I never asked him for any reduced rate.

Q. Did the billing clerk or the Agent, or the Chief Clerk, or any of the parties you talked with about this shipment, see these horses at any time prior to the loading of them?

A. Yes sir.

Q. Who was it?

A. There was a man on the platform who had charge of loading freight.

Q. Did he see them?

A. He saw the horses—saw us load them.

Q. Did you tell the Agent they were race horses?

A. Yes sir.

Q. What was it?

A. I told him what kind of horses they were—told him they were race horses, that I was going to the races with them, I wanted to get there in time and in good shape, wanted to go on a good train, a fast train that made no stops, and made arrangements for them to go on the through freight called the red ball.

Q. You didn't make any inquiry did you?

A. About what?

Q. Any rates?

A. I never ask them what the rates were, I was going to ask at the other end, we always paid at the other end.

Q. You didn't ask him anything about shipment, did you?

A. No sir, I didn't ask him for any reduced rate.

Q. You can read?

A. Yes sir.

Q. Had an opportunity to read this contract?

A. Not before it was signed, no.

Why?

A. Because the billing clerk in putting it out for me to sign, holds it down there, there is four or five places to sign, and he takes the bill in his fingers, and says "sign here" and turns it over and says "sign here," and I knew I had to sign a bill in order to get the horses shipped.

Q. It didn't make any difference to you what you signed?

A. Yes, it did make a difference to me what I signed.

Q. Did you ask him to let you read it?

A. No sir I didn't.

At page 125 R. he testifies to the agreement, and conversations had with reference to the shipment.

Smith testifies that his recollection was that he paid \$20.00, and then \$2.60, freight.

It runs in my mind it was twenty, but it could have been possible I gave him a twenty dollar bill and he gave me back some change, but I think it was \$20.00. Part of the sum was collected at the time, and the balance of it was collected at the track.

Du Bois, the Agent, of the plaintiff in error, testifies:

Q. Did you tell him about a reduced rate before you took the contract? Did he say anything to you about wanting a reduced rate?

A. No sir.

Q. No conversation whatever was there about a reduced rate, Mr. Du Bois?

A. No sir.

Q. What did he say when he said he wanted to ship those horses?

A. Well, I cannot state the conversation word for word, he probably came and asked for a contract.

Q. Did you have any conversation prior to the signing of the contract?

A. No sir.

Q. When did he sign this contract?

A. Why, I think it was about 8 o'clock in the evening.

Q. Two hours after you went on duty?

A. Yes sir.

Q. You go on at six?

A. Yes sir.

Q. Horses had already been loaded then, had they?

A. Yes sir.

Q. Did they tell you what kind of a freight they wanted to ship on, what kind of a train they wanted to ship these horses on?

A. No sir.

Q. You say Mr. Robinson and Mr. Moore, never said anything to you about going out on this train?

A. No sir.

Q. Did you say anything to them about going out on this train?

A. No sir.

Q. How does the Conductor get the billing?

A. From the yards at Argentine.

Q. How do you get the billing there?

A. By messenger boys.

Q. You say Mr. More and Mr. Robinson got the billing about 8 o'clock?

A. About 8 o'clock.

Q. Horses were then already loaded?

A. Yes sir.

Q. Had he made any arrangements with you to ship those horses before that time?

A. No sir.

Q. You don't know of any solicitation on their part for a reduced rate?

A. No sir.

Q. Do you know of anybody that had a conversation with Mr. Robinson or Mr. Moore, prior to the loading of these horses?

A. No sir.

At page 157 R. Agent J. E. Hult testifies:

Q. You required always didn't you on the Santa Fe at the time you were employed, when a shipper made those shipments, before he could make the shipment, that he must sign one of those contracts of affreightment?

A. You mean we wouldn't accept a shipment without executing a live-stock contract?

Q. Yes sir?

A. No sir, we would not do that.

Q. The shipper would be compelled to sign one before he got his shipment?

A. Before we accepted the shipment.

Now it will be apparent from this testimony, that the horses were loaded and shipped and all arrangements made, and the matter concluded before any alleged contract was submitted. The horses had moved to the Darick track, with Moore in charge. Robinson remained to go to Lawrence in another way, and when he found the horses had not gone, he proceeded with them. This contract was put up to him after the horses were moved. He had no opportunity to read it. It had in fact no reference to the shipment, so far as the original agreement and understanding was concerned. Neither the agent nor the Chief Clerk denied the testimony of either Robinson, Moore or Smith, that final arrangements were made by phone and in person, and the horses moved out on that agreement. If the contract had been presented to either Mr. Smith, or Moore, while there, in good faith, it probably would not have been signed, when its contents were read, as Mr. Smith, owned two of these horses that were shipped. There is no testimony in this record that the rate of freight was \$17.60, except a receipt prepared after the Railway Company knew that the horses were injured in the yards, before they arrived at Lawrence. The freight receipt was a device to make out their case, and the testimony goes to show that the local rate of freight was paid, \$22.50. The Agent at Kansas City, and the Chief Clerk who com-

pleted the agreement, before Du Bois came into service, or on duty, neither of them deny the oral agreement. Du Bois testifies that no arrangements were made with him about shipping horses, and no conversation occurred about shipping them. The Jury had a right to conclude that the purported written contract, from all of its appearances, was not properly signed, and was not a bona fide agreement, and was not within the contemplation of the parties, and the rate of freight collected, was not the rate of freight agreed on, if any at all, was agreed on, as consideration for limited liability.

It must be assumed therefore that the parties to the agreement understood that the horses were race horses, and that they would pay the regular rate of freight. This clearly appears from the evidence, and the second thought of the company, when they knew these valuable horses were injured, was to prepare a freight rate that would fit the alleged contract exacted of Robinson. The plaintiff in error must first show that the shipment was not as per individual horse, but by the car and under the released rate. This was not shown to the satisfaction of the jury. At least it was a controverted question.

The position of the plaintiff in error has constantly shifted in this case. The plaintiff in error contended that the oral agreement was a special agreement, and prohibited by the Hepburn Act under the decision of the Supreme Court of the United States, in the case of *Chicago & Alton Ry. Co. v. Kirby*, 225 U. S. 155. It could not sustain this position in the

Supreme Court, for the reason that there was no evidence to support the contention, that the horses were to be delivered at a special time, and for a special consideration. Its contention is stated, in its brief for a re-hearing as follows:

"This action was brought by the defendant in error in assumpsit against the Railway Company, not upon the common law obligation of the Railway Company to carry within a reasonable time without negligent delay, but upon the red ball freight, and deliver them at Lawrence, Kansas, in time for the races. Is this contract valid, or is it a method of dealing which brings about the forbidden result which was intended by the Interstate Commerce Act? Assuming that there was at Kansas City at the time of the shipment in question, a competitor, etc., * * * * the competitor sues the railway company upon the written contract. The defendant in error sues upon what has been termed the special contract. The competitor recovers \$100.00 a head for his horses, and the defendant in error recovers \$1500.00, a head for his horses. The rate of freight charged and collected in both cases, was the same. Which contract is valid, the special contract, open to the public in general, with his competitor. The contract for special delivery upon which alone this suit was brought, is an unlawful discrimination, and therefore void. The contract set out in the petition being for a special service, not noted in, but, on the contrary, prohibited by the published tariffs, even if made, was void as being in violation of the section of the Interstate Commerce Act, prohibiting discrimination, and no recovery could be had thereon. The petition of the defendant in error leaves no uncertainty that it was upon a special agreement for special service. Here in this case the attempt is made to recover upon a special contract, that is unauthorized by the tariffs, which is discriminatory in its character, and in the teeth of the prohibitions of the Act of Congress.

See Supreme Court of the United States, in
Chicago & Alton v. Kirby, 225 U. S. 155.

"The precise question was before the Supreme Court of the United States in the Kirby case; which was an action for the delay and damage to a shipment of horses."

It thus appears that the plaintiff in error for the first time has now abandoned the position that this was a special oral agreement, seeking here to set up that there was no special or oral agreement. It could not support its position in respect, to special contract, because the evidence was controverted, as to the amount of freight paid. There is not a word of testimony in the record that the special service of being placed on the red ball freight was demanded, or that the horses were to be placed on any special train or delivered at any special time, but a mere offer was made to give such service by the plaintiff in error; and therefore we have merely the breach of the oral agreement, and the plaintiff in error, if it did not collect the amount of freight which it was entitled to collect, when it collected \$22.60 instead of \$17.60, its released rate, is remitted to the Court to collect the additional freight that it was entitled to collect under the Hepburn Act, which according to counsel's brief would be 33 1-3 per cent, or \$26.40. Can plaintiff in error present for the first time a new theory to this Court?

THE ISSUE IN THE SUPREME COURT OF OKLAHOMA.

The issue then in the Supreme Court of Oklahoma, recognized by the plaintiff in error, was that the shipment moved on an oral agreement, but that this agreement being in reference to an interstate shipment constituted a special agreement, requiring that the horses be delivered within a particular time, and on a special train. It failed to sustain this theory, and the Court accepted the only plausible theory, that is, that the shipment moved upon an oral agreement, which constituted a breach of the Railway Company's obligation to carry safely, and within a reasonable time. The horses were not weighed which, according to the decisions of the Supreme Court of Missouri, is conclusive that the alleged written contract was not in good faith.

See; Leas v. Quincy Ry. Co., 136 S. W. 963;
Burns v. C. R. I. & P. Ry. Co., 132 S. W. 1;
Grant v. C. R. I. & P. Ry. Co., 132 S. W. 311.

We are aware that this Court has decided several times that the signing of the contract was conclusive on the shipper as to the terms contained, but in each of these decisions the Court clearly says that if any deceit or fraud, of whatever kind and nature, is practiced on the shipper, that these facts of fraud or deceit may be shown in the case, and the Jury are the rightful judges of the probative value of the same; and the contract in that class of cases would not be binding. Now we have here presented, the fact that

the shipment had moved; that Moore had never been asked to sign a contract, and that after the shipment had been moved, a new man comes on duty and informs Robinson that it is not necessary for Moore to sign the contract but that he (Robinson) may sign it, and Robinson believing that he is signing a mere passport, signs said contract in one part of the same, **but does not sign the valuation clause**, and this is evidence that the purported contract was not treated as a contract at all; and it was shown by the evidence that the men paid their fare, and this is a fact contrary to the contention of the plaintiff in error, which, if the shipment was made under the tariff rate now contended for, one man would have been passed free, in charge of the horses. The evidence further shows that the horses were shipped at the local rate, and that the freight was to be paid at whatever that rate was, for that class of horses, and that \$22.60, was required of the shippers, and paid, while a receipt is put in evidence, issued at and made out at destination, which only shows \$17.60, the rate contended for. The Jury had a right to believe that this \$17.60, was inserted in this receipt to be used for the purposes of this suit, in case there was any controversy by litigation. These are facts and circumstances which went to the Jury, on whether or not the shipment moved by oral agreement, or by a written contract. Plaintiff in error for the first time seriously contends that the shipment moved otherwise than by oral agreement. H. H. Smith, who was interested in the shipment, having two horses himself in the shipment, first made

the arrangements for the shipment, and the Company was informed that two of these horses, in all probability belonged to him; had seen these horses loaded and the shipment depart from the point of loading to the Darick track, a number of miles from the place of loading, to be distributed to the Argentine yards, on the Kansas side. Smith had left the point of shipment for some time when the alleged contract was put out to Robinson. There is no evidence that Robinson had any actual authority, and there is no evidence that Moore was ever asked to sign a contract himself. It is true Robinson testifies that he had authority in a general way to sign Moore's name, but there is no evidence in this case that Moore authorized Robinson to sign this contract, or knew anything about it. As matter of fact three of these horses belonged to H. H. and S. H. Smith, the former an attorney of experience, and the latter an attorney for the Interstate Commerce Commission. It is very clear that H. H. Smith who was present was advising the shipment on the oral agreement, and for the short distance, expected to pay the rate of freight for horses of that class. The contract put in evidence itself, shows that the Agent or the Clerk at said point had no authority to bind the Company on a valuation exceeding \$800.00; then, if the agreement was bona fide, how would he have proceeded under that written contract to bind the shippers, without authority. Every person conversed with at the point of shipment, who had and who assumed to have authority, knew these were valuable race horses, and under the Hart case,

the Company would be guilty of collusion, if its position is correct, knowing the value of the horses, to have permitted a shipment under the purported released liability.

**THE FACTS FOUND BY THE SUPREME COURT
OF OKLAHOMA, ARE CONCLUSIVE ON THIS
COURT.**

The Supreme Court found that the shipment moved on an oral agreement, and that no contract was executed until after the shipment had moved; and that this contract was procured by deceit and fraud and were not shipped on a fast freight but left at Argentine. The Jury and the trial court and the Supreme Court found that the rate of freight paid, was in excess of the rate claimed under a released liability contract. Therefore there was no consideration for any such contract, even though it was bona fide and in good faith. An oral contract is just as binding as a written contract, and is not in contravention of the Hepburn Act, or the Carmack amendment, so that the only question presented in this case is as determined by the Supreme Court of Oklahoma, whether the real shipment that the minds of the parties met on was according to the terms of the oral agreement, or according to the terms of the written agreement. It appears clear from the evidence in this case that the understanding was that the shipment was to be by the oral agreement and the horses were to move on fast freight, and, that the parties were ready and willing to pay the rate of freight necessary for this class of stock.

It appears that \$5.00 more than the rate named in the contract, procured from Robinson by deceit, was collected. This amount was collected also without any reference to any contract or any rates specified in the contract. The plaintiff in error is then remitted to an action to collect whatever the residue is, if any. The plaintiff in error contends in its brief that the rate at \$17.60, would be 33 1-3 per cent less than the regular rate. If this is true then, the plaintiff in error should have collected \$26.40, instead of \$22.60. Could it be contended that S. H. Smith, the owner of one of the horses in question, should be bound by an agreement procured after all arrangements were made and contract completed for the shipment of one of these horses? Could H. H. Smith be bound by an unauthorized contract executed by a person unauthorized after the shipment had moved, and as testified by J. E. Hult, the shipment would not move unless one was executed at some time before the horses reached their destination or until the shipment was completed?

This Court has heretofore determined that the Supreme Court of the United States will not inquire into the facts, but depend upon the findings of the Supreme Court of Oklahoma.

Hilton v. Dickman, 10 U. S. 165;
United States v. Burchard, 125 U. S. 178.
Carter v. ----- Ocean Ins. Co., 554

Rule 6 of this Court 2.

Where the jurisdiction of this Court is doubtful, a writ of error will not be awarded.

N. Y. & N. E. Ry. Co. v. Bristol, 151 U. S. 555;
So. Ry. Co. v. Carson, 194 U. S. 136.

The Interstate Commerce Act does not contemplate either a written or an oral contract, and neither has been legislated about by Congress, and until Congress exercises authority over these contracts, they will be regulated by the law of the place where they are made. An oral contract is valid in Missouri, in reference to an interstate shipment, so long as its terms do not contravene the provisions of the Act.

Railroad Company v. Abilene Cotton Co., 204 U. S. 426;

Merchants Cotton Press Co. v. Insurance Co., 151 U. S. 368.

The Supreme Court of the United States will not take jurisdiction of a case decided on a theory not necessary to determine a federal question.

Case Mfg. Co. v. Soxman, 138 U. S. 431.

If the defendant in error and the parties shipping with him, could not make a valid oral agreement and rely upon it, shipping out on a fast freight, having the rate of freight collected at the point of destination, as the record shows it was collected here, then such contract must be considered invalid. If this fact was submitted to the Jury and found to be the contract, and the Supreme Court of Oklahoma found it to be the contract before this Court can take jurisdiction, it must determine that there are no facts in the record to support such a finding. Otherwise this Court would have no jurisdiction.

Atlantic Coast Line Co. v. Riverside Mill Co., 40 S. P. A.

Hammond v. Whittredge, 204 U. S. 547.

“As to when the question may be raised, see Forbes v. Virginia State Council, 216 U. S. 399.

Where the disposition of a Federal question was not necessary to the determination of the cause and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained."

Rogers v. Jones, 214 U. S. 204.

See also; Leathe v. Thomas, 207 U. S. 93; California Powder Works v. Davis, 151 U. S. 393; Gaar, Scott & Co. v. Shannon, 223 U. S. 468.

Questions of fact found by State courts are conclusive on the Supreme Court of the United States.

King v. West Virginia, 216 U. S. 100;

Waters-Pierce Oil Co. v. Texas, 212 U. S. 97; Chrisman v. Miller, 197 U. S. 319.

The cases cited by counsel for plaintiff in error, are not applicable, because, in all of the cases cited, the question presented was that the shipment moved upon the written contract, but there was no bona fide valuation.

In this case it has been determined by the findings of the Supreme Court of Oklahoma that the shipment moved on the oral agreement, and that a greater rate of freight was collected than that required under the purported contract, and the horses not shipped in a reasonable time but negligently injured.

We quote from the opinion of the Court:

"Now in the case at bar, up to and including a complete consignment and surrender of control of stock by the shipper, the starting of the shipment in transit and the assumption of liability for negligence by the carrier, every move made, every step taken towards the shipment, was under and pursuant to a parole contract. Under these circumstances the shipper had the right to assume that his stock would not be grossly misused, and

to act on the faith thus inspired, and rely on the rights thereby accrued to him, and the carrier will not be permitted to take away those rights and relieve itself of the liability thus incurred, without having given him a fair opportunity to assent thereto. The record discloses that such opportunity was not given. Therefore the verbal contract must control. There being no agreement in the verbal contract as to the extent of limitation of liability, the carrier is held to its common law liability for its negligence."

The Supreme Court of the United States has affirmed this holding in the case of the Railway Co. v. Kirby, 226 U. S. 155, wherein it is said:

"The implied agreement of the common carrier is to carry safely, and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, etc."

The submission as a question of fact as to whether the shipment moved by oral contract, or the written contract was a question of practice in this jurisdiction, and is not reviewable by the Supreme Court of the United States.

"Matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate courts."

Parsons v. Bedford, 7 Law Ed. 732;

Earnshaw v. United States, 146 U. S. 60.

As to whether there was any evidence, and as to whether the evidence was sufficient to support the findings of the Supreme Court of the State of Oklahoma, is a matter for the Supreme Court of Oklahoma to determine, and not the Supreme Court of the United States.

The Francis Wright, 105 U. S. 381.

And this is so when the facts are submitted to a Referee or a State court.

Boggs v. Mining Co., 18 Law Ed. 245.

The trial Court submitted to the Jury, the question whether or not, at the time the oral agreement was made, if they believed, that Robinson represented the value of said mare to the Agent of the plaintiff in error and said Agent relied on said representation of value so made, and granted by reason thereof to the plaintiffs, a rate less than the regular rate for this class of shipments, that it would be the duty of the Jury to limit the findings on damages to the sum of \$100.00 as contended for in the answer of the plaintiff in error.

The statement of the plaintiff in error that this was equivalent to directing a verdict, is not true, because if the Jury believed that such representations were made, then Robinson would be bound, provided he secured a reduced rate. If he did not secure a reduced rate, and paid \$22.60, as the evidence shows, then he would not be bound by such a limitation, if any in fact, was had in the contract on which the shipment was made. They had the right to determine on what contract the shipment was made. They had the right to determine that the oral agreement was not merged into the purported written agreement.

Mr. Du Bois testified, he being the Agent of the plaintiff in error:

Q. No conversation whatever was there about a reduced rate, Mr. Du Bois?

A. No sir.

If the case was decided upon some ground where it was not necessary to bring the Federal statute into controversy, then no Federal question is presented, and the Supreme Court of the United States, has no jurisdiction.

See; Lawler v. Walker, 14 Howard, 149; 14 Law Ed. 364, and cases there cited.

Also, it is not sufficient that the Supreme Court can say that it ought to have decided some Federal question, or that it might have decided one.

See, The Victory, 18 Law. Ed. 848.

It must appear that the State Court could not have reached its judgment without expressly deciding the Federal matter.

Bachtel v. Wilson, 204 U. S. 36.

If the Statute is only collaterally involved, the Supreme Court of the United States has no jurisdiction.

Candee v. York, 168 U. S. 642;

Williams v. Oliver, 13 Law. Ed. 921.

If the case is disposed of upon non-federal grounds, the Supreme Court has no jurisdiction.

Harrison v. Morton, 171 U. S. 38;

Klinger v. Missouri, 20 Law. Ed. 635;

Chicago Railway Co. v. Illinois, 50 Law. Ed. 596.

All of the cases cited by the plaintiff in error were presented to the Supreme Court of Oklahoma, and the questions involved were thoroughly discussed on the application of the plaintiff in error for a rehearing. The Croninger case and the Kirby case, were especially relied upon in the Supreme Court of Oklahoma, but the Court held that there was no evidence to

sustain the contention that the oral agreement was a special contract, as contended by the plaintiff in error. That the Croninger case had no application because that was a case where the contract was not drawn in question, and it was conceded that the contract pleaded was made, but was not fairly entered into, there being no agreed valuation; that the question presented here was whether or not from the facts the shipment moved upon the oral agreement and the stock had departed according to its terms. If so, then there was no limitation of liability. In clear support of this contention, it was shown that \$22.60, was collected, and the fare of the men were paid.

When the plaintiff in error failed to ship the horses on a through freight and converted them into its own yards, there to be grossly injured, and took 18 hours, after loading, to deliver them 50 miles, can this Court say that the oral agreement was breached, but the breach is healed because of the attempted substitution of a contract by a Clerk, who came on duty after the shipment had left and after the contract had been completed, and put on this young man a purported contract when he refused to sign the valuation clause in it.

We respectfully submit to the Court that the judgment of the Supreme Court of Oklahoma is correct, and that it must be affirmed, and the writ denied, with 10 per cent damages for delay.

Respectfully Submitted,

H. H. SMITH,
Attorney for Defendants in Error.

Office Supreme Court, U. S.

FILED

18
FEB 25 1914

JAMES D. MAHER

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 450.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, PLAINTIFF IN ERROR,

vs.

C. E. ROBINSON.

No. 451.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, PLAINTIFF IN ERROR,

vs.

H. F. MOORE ET AL.

**NOTES OF ORAL ARGUMENT FOR DEFENDANTS IN
ERROR.**

The two cases are substantially identical in all respects save the parties defendants in error. The cases originated in suits brought by certain shippers of horses in the District Court of Lincoln County, Oklahoma; judgment for plain-

tiffs; appeal, after motion for new trial denied, to the Supreme Court of Oklahoma; judgment of trial court affirmed; after denial of petition for rehearing, writ of error to this court.

Motions to dismiss were made by defendants in error; cases placed on summary docket.

I. Jurisdiction of this court.

(a) As will appear from an examination of the proceedings below, there are concurrent findings of fact by the two courts.

(b) Though a Federal ground was alleged in the amended answer of the railroad, the cases were not decided on such ground, it being determined by the two courts that there was no necessity for deciding the Federal question.

The crux of the decisions of the courts below was that a certain instrument in writing was invalid, the invalidity being predicated on general law. Under such circumstances this court is not authorized to review the decision.

In *Delmas vs. Ins. Co.*, 14 Wall., 661, this court said:

"When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review."

Followed in *Tarver vs. Keach*, 15 Wall., 68; *Rockhold vs. Rockhold*, 92 U. S., 130; *Life Ins. Co. vs. Hendren*, 92 U. S., 297; *U. S. vs. Thompson*, 93 U. S., 589; *Bank vs. McVeigh*, 98 U. S., 333; *Dugger vs. Bocock*, 104 U. S., 601, and other cases.

Where the case is decided below on some ground where it was not necessary to bring in a Federal statute, then no Federal question arises and this court will not take jurisdiction.

Lawler vs. Lawler, 14 How., 149, and cases there cited.

Nor is it sufficient to say that the courts below should have decided the Federal question.

The Victory, 6 Wall., 382.

It must appear that the decision of the State court could not have been reached without deciding the Federal question.

Bachtel vs. Wilson, 204 U. S., 36.

If the statute is only collaterally involved, this court does not have jurisdiction.

Conde vs. York, 168 U. S., 642.

If the case has been disposed of on non-Federal grounds, this court has no jurisdiction.

Harrison vs. Morton, 171 U. S., 38.

The rule where both Federal and non-Federal questions were present in the court below and error was sued out the court quoted from *Eustis vs. Bolles*, 150 U. S., 361, in *Harrison vs. Morton*, 171 U. S., 38, 47:

"It is settled law that, to give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock vs. Memphis*, 87 U. S., 590; *Cook Co. vs. Claument & Chicago Canal and D. Co.*, 138 U. S., 635. It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised, and decided against such party, and the decision of the latter question is sufficient, notwithstanding

standing the Federal question, to sustain the judgment, this court will not review the judgment."

In the case at bar the decision, as stated above, was based on non-Federal grounds, namely, that certain instruments in writing, the execution of which was not denied, were not *bona fide*, but fraudulent, and did not govern the shipments.

Holding that there was no necessity under the pleadings and facts of the present case for construing the Act to Regulate Commerce, the Supreme Court of Oklahoma said:

"The record in this case clearly shows negligence on the part of the railway company. Hence, the remaining question is: Was the liability of the company limited to the value fixed in the written contract? A determination of this question depends upon whether the value was fixed by the shipper and whether such value was fairly agreed upon between the shipper and the agent of the carrier. The question may properly be determined without the necessity of construing the Federal statute known as the 'Hepburn Act'" (129 Pac., 23).

II. *Assuming the jurisdiction of this court, there are certain matters which this court will not review.*

(a) As to the pleadings, these falling within the practice of the State courts, this court will not examine further than to ascertain the ground on which the action was brought and the issues determined.

County of Buena Vista *vs.* Iowa Falls, etc., 112 U. S. 177.

Stevens *vs.* Nichols, 157 U. S., 371.

Gormley *vs.* Bunyan, 138 U. S., 623.

(b) As to the instructions to the jury, an assignment of error herein objects to a part of the charge of the trial court; taken as a whole, as it must be (Baltimore, etc., R. Co. *vs.* Mackey, 157 U. S., 72; Evanston *vs.* Gunn, 99 U. S., 660;

U. S. *vs.* Conklin, 1 Wall., 644), it is submitted that there is no error in the charge to the jury.

(c) The facts found by the two courts below, being identical, are conclusive on this court.

King *vs.* West Virginia, 216 U. S., 100.

Waters-Pierce Oil Co. *vs.* Texas, 212 U. S., 86.

Chrisman *vs.* Miller, 197 U. S., 319.

III. The present cases and what was decided by the courts below.

(1) Actions for damages to certain race horses, shipped by plaintiffs over the lines of the defendant, predicated on a parol contract and the implied contract "to carry safely."

The actions were founded on a certain parol agreement to carry and (as was stated by this court in Chicago and Alton *vs.* Kirby, 225 U. S., 155) "the implied agreement of a common carrier (is) to carry safely."

2. The issues. The issues of the cases as stated by the Supreme Court of Oklahoma (Rec. No. 450, p. 8) were as follows:

"As to the first proposition [judgment desired by defendant on the pleadings] the plaintiff did not rely on a written contract of any character, nor did he sue for violation of the terms of the written contract, but alleged the shipment to have been made under a definite verbal contract and sought recovery on the grounds of gross negligence of the company in the manner of handling the shipment. This presented the material issues to be tried, a determination of which in favor of the plaintiff would entitle him to recover and which were joined by defendant in its general denial of the allegations in the petition."

(3) The ultimate facts found by the courts below.

(a) It was found by the two courts below that the plaintiffs and the defendant entered into a contract for the transportation of certain race horses from Kansas City, Mo., to Lawrence, Kan.; that this agreement was verbal and was made prior to the loading and the movement of the horses; that in said agreement there was no mention of value other than the statement that the horses were race horses; that said agreement did not name the rate to be charged nor contain any release of the carrier from liability.

(b) It was also found that there was executed by the parties some two hours or more after the shipments moved and after the horses had been wholly committed to the carrier for transportation an instrument in writing; that said instrument contained a printed (but unsigned) valuation of the animals and a printed release of liability of the carrier to the amount of \$100 per horse, but contained no rate. It also appears that this document was not executed as required by its terms. See Rec. No. 450, p. 39.

(c) That the shipments in question moved and were transported to destination under the oral agreement mentioned above, plaintiff's brief (p. 31) to the contrary notwithstanding.

(d) That the written instrument was not *bona fide*; that it did not contain the same terms, conditions, and stipulations as were in the parol agreement, and that it could not and did not take the place of the oral contract.

(e) Injury to the race horses by the negligence of the carrier was practically admitted; it was clearly proven at the trial and found.

(f) So, also, the damages are practically admitted by the carrier; it, however, denies liability therefor.

(g) That the shipments not moving under the written instrument, but under the parol agreement, there was no necessity for construing the Act to Regulate Commerce, and particularly the Carmack amendment, so-called.

IV. The cases and act relied on by the plaintiff in error are not decisive of the questions here.

(a) The inapplicability of the cases relied on by the plaintiff in error follows from brief mention of the facts of each:

Chicago and Alton vs. Kirby, 225 U. S., 155; this suit was to recover for the failure to make delivery at a particular time; there was no question of breach of duty to carry safely.

Adams Express Co. vs. Croninger, 226 U. S., 491; the goods had not been valued by the shipper, but the receipt provided that, in the event of failure to state a valuation, then the value should be \$50. No such element is present in the pending cases.

In each of the following cases cited by the plaintiff in error there was a valid and binding contract limiting the liability of the carrier to stated amounts; there was no allegation and proof of a contract to transport other than as provided in the signed instruments: *Chicago, Burlington & Quincy Railway Co. vs. Miller*, 226 U. S., 513; *Chicago, St. Paul, Minneapolis & Omaha R. Co. vs. Latta*, 226 U. S., 519; *Wells-Fargo & Co. vs. Neiman Marcus Co.*, 227 U. S., 469; *Kansas City So. R. Co. vs. Carl*, 227 U. S., 639; *Missouri, Kansas & Texas R. Co. vs. Harriman*, 227 U. S., 657. In fact, the brief for plaintiff in error (pp. 34-49) clearly states the fact so to be in each instance.

(b) The part of the Act to Regulate Commerce (the so-called Carmack amendment) on which plaintiff in error relies reads:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

To hold, as plaintiff in error contends, that under the provisions above quoted there can be no lawful shipment unless there be issued a bill of lading or receipt would, it is submitted, be doing violence to language. But in the present cases the court must go farther to follow the plaintiff in error, and in construing the provision also hold that no bill of lading or receipt would be valid unless the same had within its terms the limited liability of the carrier. As was stated by the Supreme Court of Oklahoma (Rec., No. 450, p. 10):

"The question here is not a question of law as to whether the carrier had authority to limit its common law liability to a value fixed by the shipper and fairly agreed upon between the shipper and carrier, but is a question of fact whether such value was fixed by the shipper and whether it was fairly agreed upon between the parties."

The language of the provision of the act while mandatory, requiring the issuance of a bill of lading or receipt, does not prescribe the terms of such a document, save prohibition of total exemption from liability for loss, damage, or injury to property.

(c) The plaintiff in error cannot rely on its own actions to bind the defendants in error.

The plaintiff in error relies on certain indicia of its own making to favor the idea that there was a limited liability; the amount of freight paid or alleged to have been paid is shown. The testimony is not clear as to the amount paid. It is clear, however, that the amount of freight was not ascertained and was not settled until after the carrier had been advised of the injury to the horses. To show that the amount, which is alleged to have been charged, would be computable at the released rate, permits the carrier after knowledge of the damages to substitute a valuation without the consent of the shippers. This court has stated the rights of a carrier, where it has rates which vary with the liability, and there is no valuation stated.

In *Kansas City Sou. R. Co. vs. Carl*, 227 U. S., 639, 650, it is said:

"It follows, therefore, that when the carrier has filed rate sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation; for, in the absence of knowledge, the carrier has a right to assume that the higher of the rates based upon value applies. In no other way can it protect itself in its right to be compensated in proportion to its insurance risk."

In the cases at bar the carrier had three rates varying with the valuation (Rec. No. 450, p. 44), all open to the public shipping horses and other animals. It was its duty, no valuation having been agreed upon, to charge the highest rate, as stated by this court to be its right. If, in truth, it has failed to so charge, it has now a claim against the shippers for an undercharge.

V. Assuming that the entire cases are before this court for consideration, the following questions on the merits arise:

(a) Whether or not the verbal contract for shipment was a valid one, or are the provisions of the Act to Regulate Commerce such as to prohibit parol contracts for shipment, when such contracts are permissible under or not denied by the act and the terms of the lawfully filed and published tariffs.

(b) Whether or not the particular shipments moved under the verbal contract, as was held by the trial court and the Supreme Court of Oklahoma. If so, as is insisted by the defendants in error, then no Federal question arises for the determination of this court.

(c) Whether or not the written instrument was "fairly made" (*Hart vs. Pennsylvania R. Co.*, 112 U. S., 331, quoted with approval in *Kansas City Sou. R. Co. vs. Carl*, 227 U. S., 639); this question was answered in the negative by the two lower courts.

(d) Assuming that the shipments moved under the provisions of the Act to Regulate Commerce and the tariffs duly filed and published, under all the facts and circumstances did the shippers and railroad have a special arrangement in accord with the tariff provisions for the transportation of animals of a greater value than \$800 each (Rec. No. 450, p. 44).

It is submitted that this court has no jurisdiction of the matters herein and that the motion to dismiss should be granted.

It is further submitted, the jurisdiction of this court being assumed for the purpose, that the shipments in question moved and were transported under the parol agreement

with no reference to or mention of the definite value of the race horses or the asking of the rate or the according of a reduced rate dependent upon the value; that a carrier cannot properly, after a shipment has been placed in its control and is moving under a parol agreement, substitute a written instrument inharmonious with the parol agreement, except by the free consent of the shipper and without taint or suspicion of fraud; that parol agreements are permissible under the Act to Regulate Commerce, certainly if, as here, open to all; that the carrier cannot properly, after notice of injury to a shipment, collect freight based on a valuation which it inserts in an instrument (whether bill of lading or expense bill) and thereby bind the shipper without his knowledge; that the written instrument relied on herein was, as was found by the two courts below, not *bona fide*, not fairly entered into, and fraudulent against the shippers and therefore invalid.

JOHN B. DAISH,

Attorney for Defendants in Error, Robinson et al.

WASHINGTON, February 24, 1914.

[23944]